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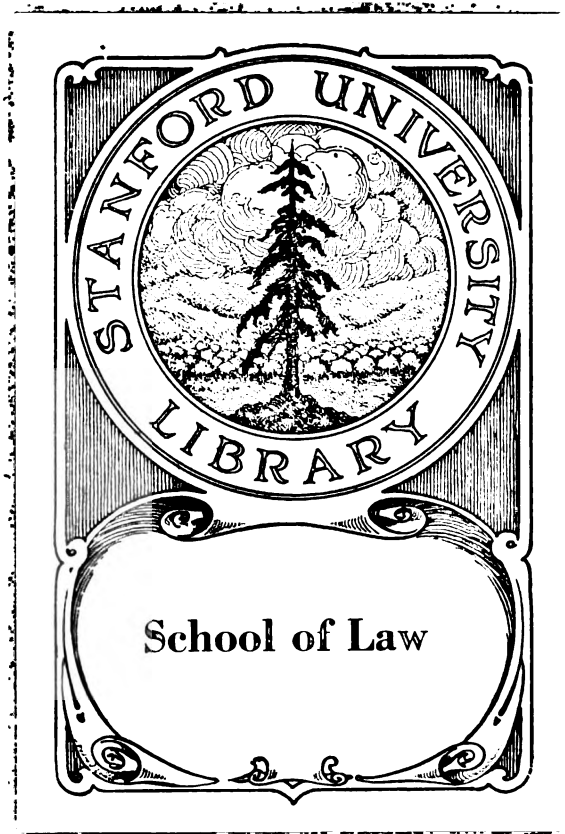
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# Illinois Law Review

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# ILLINOIS LAW REVIEW

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## A FIELD FOR CORPORATE LAW REVISION—COLLATERAL ATTACK

BY WILLIAM B. HALE.<sup>1</sup>

The period of unlimited destructive criticism with regard to corporations may be regarded as about ended. It is time for reconstruction.

The public policy of every state favors the creation of corporations. Since this is so it is desirable from every point of view that they should be created and supported in such a way that they can transact their business efficiently. This is obvious. It should also be obvious that all penalties imposed upon corporations, for exceeding their powers or failing to comply with the necessary technicalities of the various laws which govern them, should be made to fall equitably—so that while accomplishing the end sought they do not jeopardize the progress of general business. But under the pressure of a vague adverse public opinion the decisions of our courts have introduced a confusion of ideas—due to the fact that in seeking to correct certain well established evils, sweeping penalties have been held to exist, which have fallen in ways highly unjust to the public as well as to the corporations themselves; unfair weapons have been put into the hands of unscrupulous parties; the courts have been burdened with technical questions in an increasing degree; and the resulting economic waste is enormous.

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With these general principles in mind it is the purpose of this paper to discuss the present condition of the law of corporations with regard to three of its important phases, to point out how certain clear ideals of the common law have been practically abandoned, and to suggest statutory remedies. These three phases of the law relate to the doctrine of *ultra vires*, of *de facto* corporations and of foreign corporations. They are closely related because in each subject the present state of the law is largely the result of attempts in detail to apply the common law doctrine of collateral attack. How successful this application has been will appear in the discussion.

*Ultra Vires.*—The law of this state with respect to *ultra vires* contracts has undergone an unfortunate experience and is still extremely difficult to apply.

The early doctrine is represented by the leading case of *Bradley v. Ballard*.<sup>2</sup> This was a bill in equity brought by a stockholder of the North Star Gold & Silver Mining Company to enjoin the prosecution of a suit pending in the Circuit Court against this corporation upon certain promissory notes which had been given by the company, and to cancel other notes upon which no suit had been brought. The corporation was organized under the laws of Illinois and its charter stated that its operations would be carried on in the City of Chicago, but as a matter of fact the corporation was engaged in mining in Colorado and for that purpose borrowed large sums of money for which the notes had been given. It was not claimed that there had not been given full and fair consideration for the notes, but their cancellation was sought upon the ground that they were given for money borrowed to enable the company to prosecute a business which it had no power to prosecute.

Conceding that the corporation had no power to engage in mining in Colorado, the court nevertheless dismissed the bill on the ground that the contracts represented by the notes had been completely executed on one side by the payment of the money and that, when a corporation seeks thus to evade the payment of borrowed money,

"It is pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender of the money knew that the corporation was transacting a business beyond its chartered powers, and that his money would be used in such business, provided the business itself was free from any intrinsic immorality or illegality."

The court further held that the doctrine of *ultra vires* is applied only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty; yet that while the contract remains executory, the powers of corporations cannot be extended beyond their proper limitations for the purpose of enforcing such contract, and on the application of a stockholder a court of chancery would interfere and forbid the execution of such a contract.

"That while courts are inclined to maintain with vigor limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. This is demanded by the plainest principles of justice."

The opinion in this case appeals to one's sense of justice, but it does not represent the law today. For in the subsequent case of *National Home Building Assn. v. Bank*,<sup>3</sup> the theory of strictly *ultra vires* acts as distinguished from acts in abuse of power was established and has since prevailed.

The National Home Building case was foreclosure. The building association had acquired real estate subject to a mortgage which it assumed and agreed to pay. In this foreclosure case a deficiency decree was sought against the association and it defended on the ground that under its charter it had no power to acquire any land except such as had been mortgaged to it or in which it had an interest and that since the property in question was not of this character its acquisition of such property was beyond its powers and its agreement to pay the mortgage therefore void. The court sustained the Building Association in its defense—a result which seems highly inequitable. For if the property had turned out to be valuable, there is no rule of law by which the corporation could have been deprived of the profit thus acquired. It is true that the state might compel the sale of such property, but it could not require its confiscation. Thus a material part of the contract by which it acquired this property was set aside by the court with the result that the person who sold the property to the corporation and had put the mortgage upon it was probably held liable on this deficiency decree instead of the corporation.

There is a line of cases relating to the contracts of insurance made by mutual benefit associations which illustrate the inequities of this doctrine in a marked degree. In *Rockhold v. Canton Mas.*

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3. 181 Ill. 35.

*Mut. Ben. Society*,<sup>4</sup> suit was brought upon an insurance policy issued to one of the members of the society by which the society agreed to pay a certain sum when such member should reach the age of seventy. All the premiums had been paid upon this policy in full over a period of eleven years. The beneficiary had arrived at the age of seventy and sued to recover the amount of the policy. The corporation defended on the ground that it was organized for the benefit of "widows, relatives, heirs and devisees of deceased members" and had no power to make a policy by which it agreed to pay a certain sum to a living person. This defense prevailed.

In *Benefit Association v. Blue*,<sup>5</sup> and in *Wood v. Mystic Circle*<sup>6</sup> (cases similar to the Rockhold case) a recovery was allowed because although the insurance policies in question were issued to persons not possible within the provisions of the *by-laws*, there was nothing within the *charter* of the corporation to prevent the contract of insurance from being valid. But in *Steele v. Fraternal Tribunes*,<sup>7</sup> the certificate of organization prohibited the corporation from taking in a member over 51 years of age, and hence, although the officers knew that the plaintiff was over 51 when the insurance policy was taken out, the defense prevailed. And there are at least ten other cases in the Supreme and Appellate Courts where these same questions have been involved and insurance policies held valid or invalid according to whether they were technically authorized by the provisions of the charter.

Two other interesting illustrations may be taken from the decisions of the Appellate Court: In *Chicago Pneumatic Tool Co. v. V. H. W. Jones Mfg. Co.*<sup>8</sup> a suit was brought against the Tool Co. for the price of certain mica washers which the corporation defendant had agreed to purchase. The defense was that the contract was beyond its corporate powers and the Appellate Court reversed a judgment for the plaintiff because the trial court had not allowed evidence to be introduced to show that mica washers could not be used by the defendant in its business of making tools. In the subsequent case of *Chicago Pneumatic Tool Co. v. Munsell*,<sup>9</sup> the court held that the same defense could not prevail because, since the corporation could buy mica washers for some purpose (as for example in building a factory or erecting machinery), the defense

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4. 129 Ill. 440.

5. 120 Ill. 21.

6. 212 Ill. 532.

7. 215 Ill. 190.

8. 91 Ill. App. 547.

9. 108 Ill. App. 344

that it could not buy them for the particular purpose desired could not prevail. It is upon this kind of distinction that the law now stands; for the leading case of *National Home Building Association v. Bank*<sup>10</sup> has established the principle that all strictly *ultra vires* acts are void and that no action may be maintained upon them in the courts. This rule is based upon three grounds: The obligation of everyone contracting with the corporation to take notice of the legal limit of its powers; the interest of stockholders not to be subjected to risks which they have never undertaken, and the interest of the public that the corporation shall not transcend the powers conferred upon it by law. And there has thus arisen the distinction between strictly *ultra vires* acts, or those which the corporation could not do for any purpose, and acts in abuse of corporate power which relate to such contracts as would be valid for some purposes but not valid for the particular purpose in question.

The law with respect to real estate illustrates the theory more exactly. Here it is well established that if a corporation has the power to purchase any real estate for any purpose a contract to purchase a particular piece of property will always be held valid between the parties whether it is executed or unexecuted, and irrespective of the purpose for which the real estate is acquired. But if there is no power to purchase any real estate for any purpose then all contracts to purchase real estate or deeds conveying real estate to the corporation are held void.<sup>11</sup>

With the rule of *ultra vires* thus based upon a theoretical construction of the law relating to corporate charters, it is important to inquire whether the reasons which have been given for such a rule are sound and whether the rule itself is consistent with modern business conditions.

It is said first that everyone contracting with a corporation is under obligation to take notice of the legal limit of its powers as shown by its charter. In other words, a farmer living some distance from the county seat and listening to the representations of an insurance agent is bound at peril of making an unenforceable contract to get a certified copy of the charter of the insurance company. At all events, he is obliged to examine the charter in some way before he takes a policy of insurance; for if he does not do

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10. 181 Ill. 32.

11. *Carroll v. E. St. Louis*, 67 Ill. 568; *Starkweather v. American Bible Society*, 72 Ill. 50; *Hough v. Cook County Land Co.*, 73 Ill. 23; *People v. Shedd*, 241 Ill. 155; *People v. Collin*, 247 Ill. 357.

this, but acts upon the representations of the agent (who may or may not know that the particular policy in question is not within the powers of the corporation he represents), accepts the policy and pays his premiums over a period of twenty years, more or less, and then either the farmer seeks to collect on a paid-up policy or an annuity of some sort, or his widow seeks to collect upon the death of her husband, the insurance company will be allowed a complete defense upon the policy if its charter says that it may not insure people who are over fifty years of age or makes some other technical limitation which is inconsistent with the policy in question.

This is the worst phase of the rule of *ultra vires* in Illinois and is nothing short of ridiculous. But its other phases are not much better. For assuming that a corporation, limited in its charter to the business of dealing in hardware, contracts to purchase from John Doe 5000 bolts of silk. It is impossible to predict in the present state of the law as to whether or not such a contract would be construed to be a strictly *ultra vires* act or whether it would be regarded as an abuse of power. Since the quantity of dry goods purchased is here very large it would seem possible that the court might easily hold the act strictly *ultra vires*, because although the dry goods company might buy a certain amount of dry goods for use in its store, it could hardly purchase 5000 bolts of silk for such purpose. Assume that under this contract the goods are delivered at a time when the market price has fallen by 50%, and the hardware company refuses to pay the contract price and defends the suit brought by John Doe on the ground of *ultra vires*. If the act is held strictly *ultra vires* the defense will be sustained and recovery limited to the common counts.

Or conversely, under the same circumstances assume that the market price advances before delivery and John Doe refuses to carry out his contract, the hardware company sues him for breach of contract, but he sets up the *ultra vires* character of the act. If the contract is held strictly *ultra vires* the defense will be sustained and recovery limited to the common counts. Perhaps the result to the corporation in this case may be said to be reasonable because the officers should be informed about the contents of their own charter. And yet in the case put it is not clear from the charter that the contract would be strictly *ultra vires*. And as a matter of fact in most transactions where this question is involved the character of the contract is such that it is apparent that the officers of the company do not give any serious consideration to the ques-



tion of their corporate powers in connection with the contract, nor could they reasonably be expected to.

The recent opinion of the Supreme Court (unpublished) in the case of *Calumet & Chicago Canal & Dock Co. v. Conkling*, illustrates not only the extreme hardship of the rule, but in this case the Supreme Court has apparently discarded altogether the difference between strictly *ultra vires* acts and those in abuse of power. In this case the Canal & Dock Company sold a block of land (called block 139) for \$15,000.00. In order to effect the sale the company loaned to the purchaser not only the whole of the purchase money, but \$35,000.00. in addition, and secured the loan by a mortgage upon the property sold and upon other property of the purchaser. The court held that the corporation had the power to sell block 139; that it had no power to make the loan; that the corporation had the power in selling block 139 to take a purchase money mortgage for the full amount of the selling price; and sustained the validity of the mortgage to this extent. The corporation therefore had power in connection with this sale to make a part of the loan that was made. The court does not distinguish between an act strictly *ultra vires* and an act in abuse of power.<sup>12</sup> Toward the end the opinion does distinguish between an act which is beyond the corporate powers and one which, although within the corporate powers, is defectively exercised on account of the lack of the power of some officer or otherwise. This distinction, of course, has nothing to do with the distinction between strictly *ultra vires* acts and those in abuse of power. Under a fair interpretation of the above well established doctrine it would seem to be the rule that if the Canal & Dock Company had the power to loan some money in connection with a sale of property, then if it loaned more money than it technically had the right to loan this excessive loan was an act in abuse of power and not strictly *ultra vires*; the transaction was a completed one; and hence the Dock Company could recover. But the court fails even to discuss the point and makes the broad statement that "Contracts made by a corporation which are beyond the scope of its powers are unlawful and void and cannot be enforced, and in such cases the doctrine of estoppel cannot be applied." This is the chief difficulty with the case; but the holding of the court to the effect that the loan of money was not within the implied powers of the corporation also indicates a highly technical attitude

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12. This distinction is clearly pointed out by Mr. Justice Carter in his dissenting opinion.

toward the contracts of corporations. Thus the common law doctrine of collateral attack may now be entirely abandoned in *ultra vires* cases. It may be that all corporate acts are subject to examination in any case and may be held invalid in collateral litigation as well as in a direct attack in *quo warranto*. And in addition to this the court leans toward the most strict construction of corporate powers.

It is therefore submitted that the first reason given for the rule in these cases is unsound under modern business conditions. Persons dealing with corporations ought not to be required at their peril to examine the charter provisions, and even the corporations themselves ought not to be penalized in the carrying out of their contracts by technical questions relating to their powers. For if such questions are so raised, it amounts to a collateral attack upon the charter and introduces into such cases so large an element of uncertainty and such a serious basis for litigation that it is entirely unfair even to the corporation.

The next reason given is that the interest of stockholders requires that they should not be subjected to risks which they have never undertaken. It requires no argument to demonstrate that this theory ought not in any case to be applied where the rights of third parties have intervened, and that no contract made in good faith should be held void merely because a stockholder might, though he does not, object.

The third reason is that it is to the interest of the public that the corporation shall not transcend the powers conferred upon it by law. And although there are public officers whose duty it is to ascertain whether corporations are acting within their charter powers and who can at any time, by a direct attack in *quo warranto*, inquire into the action in this regard of any corporation and set aside such action or prevent its recurrence, nevertheless, by reason of the fact that such public officers do not perform their duties, or because the public does not desire that they should perform their duties, persons contracting with corporations must be kept constantly in jeopardy lest some technicality of the charter which they are obliged to examine at their peril should render their dealings void! If this reason on the ground of public policy is not answered by its own statement, it is completely answered by a reference to the real estate rule on *ultra vires* as follows:

There is probably no more clearly defined public policy in Illinois of any sort than that no corporation shall be allowed to own any more real estate than is necessary in its business; and it has

been with the greatest difficulty and only after a series of unsuccessful attempts that the legislature has been persuaded to pass an amendment to the corporation law which allows the creation of corporations for the purpose of owning and operating business property. For here we find added to the policy against *ultra vires* acts in general, the fear that large corporations will acquire an extraordinary amount of land. And yet if a corporation has the power in its charter to acquire any real estate for any purpose (and it is rare that a corporation has no power to acquire any real estate) then its acquisition of particular property is not under any circumstances subject to collateral attack, and all the contracts made with respect thereto are held valid between the parties.<sup>13</sup> In all such cases the rights of the public are protected only by the action of the public officers, and a striking example of how the state may correct and prevent the acquisition of land *ultra vires* is found in the case of *People v. Pullman Car Co.*<sup>14</sup> If then the people's rights can adequately be protected in real estate cases, it is hard to perceive why they cannot be adequately protected in the same way as to all other contracts.

One other feature of the real estate rule must also be noted. The rule with respect to contracts is that if a corporation has no power to enter into the contract in question under any circumstances or for any purpose, then the act is strictly *ultra vires*. The same rule prevails in regard to real estate. But if real estate is acquired in abuse of power, then all contracts and dealings with respect thereto are as valid from the very beginning as they would be between natural persons; whereas with respect to general contracts in abuse of power this is not true, but the old rule in *Bradley v. Ballard*,<sup>15</sup> is still the law. That is to say, the validity of such contracts turns upon whether they had been partially or fully performed. This distinction is highly technical and of no value.

It would therefore seem clear that the law of *ultra vires* has created burdens upon corporations and those that deal with them in a manner which is unjust, of no advantage to any but the unscrupulous, and a constant expense to the public by reason of the

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13. This statement is not consistent with the decision in *National Home Bldg. Assn. v. Bank*, 181 Ill. 32, for there the suit was brought upon an agreement to pay a mortgage debt in a deed, but in that case the court did not consider the matter from the point of view of the real estate rule, and while this was no doubt an error, the case nevertheless stands as the leading authority on the question of *ultra vires* in general contracts not related to real estate.

14. 175 Ill. 125.

15. 55 Ill. 413.

large and increasing amount of litigation regarding these subjects. The rights of the public and of the stockholders must be protected. Corporations must not be allowed materially to exceed the scope of their charter powers, but technicalities are especially undesirable in this subject. For the public is not injured unless a corporation materially exceeds its powers; and all such cases can adequately be reached by stockholders suits or in *quo warranto*.

The common law doctrine of collateral attack was intended to prevent just the kind of difficulties that have arisen. The Illinois court has felt the public aversion to corporations, and has departed from the common law rule, first, by devising the theory of strictly *ultra vires* contracts where the doctrine was held not to apply, and second, by now holding in effect that all contracts which are beyond the corporate powers are strictly *ultra vires*. I therefore suggest that the theory of the common law be restored by eliminating all questions of *ultra vires* from cases of collateral attack. To accomplish this, I suggest the following draft for an amendment of the statute:

Add at the end of the first sentence in Section 5 of the General Corporation Law the following:

"And no such corporation or any person or corporation dealing therewith shall be excused from the full performance of any contract made between such parties on the ground that said contract was not within the charter powers of such corporation or was in abuse of its charter powers; and all relief based upon the *ultra vires* character of corporate contracts shall be restricted to suits in *quo warranto* and stockholders' proceedings in equity."<sup>16</sup>

*De Facto Corporations.*—Another place where the common law theory of collateral attack has been confused and practically abandoned is found in the law relating to *de facto* corporations. These difficulties are apparently not decreasing with the accumulation of decisions, but are rather on the increase.

Here, as in the case of *ultra vires*, the common law recognized that it would be unfair in collateral cases to try the question of whether the corporation had a technical legal existence; and thus, as the theory of the law is to protect the exercise of corporate powers from collateral attack, so corporate existence is supposed likewise to be free, and *de facto* corporations have been developed in the application of this doctrine. But, as the law has become more

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16. I have examined the laws of the various states without finding any provisions similar to this or aimed to accomplish this purpose. It is possible that such provisions exist, for the mass of material in the statutes is very great and my search has probably not been exhaustive.

clearly defined, the tests of whether or not a corporation exists *de facto* have become more and more severe, until it is almost as difficult to find a charter which will be held to indicate *de facto* existence as it is to find one which establishes a *de jure* corporation.

In the early stages of the law the slightest kind of proof was taken to indicate *de facto* existence. Railroads were allowed to condemn property and sustain their right so to do by merely producing their charter, as in *McAuley v. C. C. & I. C. Ry. Co.*,<sup>17</sup> or by introducing their charter and evidence of some act, like surveying, done in apparent conformity with such charter. But later the court inquired more diligently into the basis of *de facto* existence and announced the definite rule that to exist *de facto* four facts must be shown: (1) the existence of a valid law under which a corporation with the powers assumed might exist; (2) a *bona fide* attempt to organize as a corporation under that law; (3) a colorable or apparent compliance with the requirements of the law; (4) user of corporate powers.

These tests which have grown up regarding *de facto* corporations have arisen as a body of law entirely distinct from the cases where the requirements for *de jure* existence have been discussed. A corporation exists *de jure* when there is a valid law under which a corporation with the powers assumed might exist and substantial compliance with the mandatory provisions of such statute. A mere directory provision of the statute may be overlooked and yet a corporation exist *de jure*. And thus it appears that the third requirement for *de facto* incorporation, viz.: "a colorable or apparent compliance with the requirements of the law" is an extremely vague rule. For if neglect to comply with some of the mandatory provisions of the statute may, nevertheless, result in *de facto* existence, it is difficult to perceive how to distinguish just what mandatory provisions are so extremely mandatory that their violation will prevent even *de facto* existence and those mandatory provisions which are of so mild a character that the charter is protected from collateral attack even if they are not complied with. And this is just the difficulty that has formed the subject of a large amount of recent litigation. Take, for example, the question of whether the recording of the charter in the recorder's office is such a mandatory provision of the law that failure to comply with it prevents even *de facto* existence. There are at least twenty-nine cases in our Supreme and Appellate Courts where this

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17. 83 Ill. 348.

particular question has been seriously litigated, and still the law is unsettled. Until the recent decision of *Africani Loan Assn. v. Carroll*<sup>18</sup> the weight of authority in Illinois was clearly to the effect that the failure to record the final certificate in the office of the recorder of deeds did not prevent a corporation from existing *de facto*. It is true that there were some cases opposed to this weight of authority, and that some confusion exists, due to the fact that the court has made extreme statements in many cases which were not necessary to the opinion, and these were sometimes followed without a correct analysis of the matters actually decided. For example, in *Bigelow v. Gregory*<sup>19</sup> the matter under consideration turned upon the statutes of Wisconsin, which were materially different from those in Illinois, and yet the language of the court has been regarded as a precedent for Illinois cases. In *Richardson Fueling Co. v. Seymour*,<sup>20</sup> the question at issue turned upon the liability of directors under section 18 of the Corporation Law, but the court went on to say, by way of *dictum*, that independently of their liability under section 18 the directors were liable as partners because of their failure to record their certificate. But in *Africani Loan Assn. v. Carroll*<sup>21</sup> all previous decisions in the court were disregarded except a statement in *People v. Mackey*.<sup>22</sup> This statement relied upon was in a suit in *quo warranto* where the *de jure* existence of the defendant corporation was in issue and not its *de facto* existence, but where the court stated that the organization was *void*, without considering whether it really existed *de facto*.

Thus, while the law is in a rather unsatisfactory condition, the weight of recent authority seems to be to the effect that during the period of two years after the date when a license is issued a corporation exists *de facto* even though the certificate of complete organization has not been recorded, because it may be recorded at any time prior to the expiration of said two-year period; but that after the lapse of such two-year period, without recording the certificate, there exists no corporation. It is hardly necessary to point out that this state of the law is not consistent with sound public policy. With regard to the question of recording the certificate of organization, it would be almost as well if the law did not recognize *de facto* existence at all, but hold all charters subject

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18. 267 Ill. 380.

19. 73 Ill. 197.

20. 235 Ill. 319.

21. 267 Ill. 380.

22. 255 Ill. 144.



to collateral attack, especially when it is realized that even the most careful analysis of the decisions does not make it clear that the above statement of the law is correct.

If a third party contracts with persons acting as a corporation it is not economy to allow technical defects in organization to enter into the question of the validity of the contract which is made, or to allow either party to such a contract to escape responsibility under it by setting up such facts. For it is clearly established that even if a contract is entirely executed on one side, no doctrine of estoppel to set up any defects of organization exists against either side unless the corporation exists *de facto*; and therefore whenever the plea of *nul tiel corporation* is interposed we are thrown back upon a critical examination of the corporate charter to ascertain whether or not the above technical rules have been sufficiently complied with to insure *de facto* existence. The result is merely a reward to the unscrupulous; and a penalty out of all proportion to the crime.

Against defective organization the state always has its remedy in *quo warranto*. If the corporation does not really exist, this can be shown, and reorganization on proper lines be effected, or its property disposed of for the benefit of creditors and supposed stockholders. This is all the remedy that is necessary. When the charter of a corporation is issued the officers of the state inspect it; the original papers are all in their files. If mistakes are made an industrious officer will seek to correct them; or if subsequent interpretations of the law show that the incorporation was illegal the Attorney General should proceed. But if the Attorney General does not proceed any interested individual may inaugurate the *quo warranto* proceedings and thus protect the public right. And if suit is not started in either of these ways it ought to be clear enough that the defects in the corporate charter are not injuring the public.

I therefore venture to suggest that the true theory of the law should be, as in *ultra vires* cases, that all possibility of collateral attack upon corporate charters be eliminated; or in other words, that *de facto* existence be simplified by adopting an amendment to the Illinois statute substantially in the following form:

At the end of Section 4 of the General Corporation Law add the following sentence:

"In all suits (except a direct attack by the state and in stockholders' suits to dissolve or to inquire into the validity of the organization, such certificate of complete organization or a copy thereof certified as such by the Secretary of

State, shall be taken in all courts as conclusive proof of the *de facto* existence of the corporation in question for the period fixed for its existence."<sup>23</sup>

**Foreign Corporations.**—There is probably nothing in the law of corporations that is bringing about greater cost in legal services, advice and litigation over technicalities than the difficulties caused by the laws of the several states requiring the licensing of foreign corporations. These difficulties have arisen in Illinois from three principal sources:<sup>24</sup> (1) The difficulty of knowing to just what kinds of corporations our general foreign corporation law is intended to apply; (2) The difficulty of knowing what constitutes transacting business in this state in view of the provisions of the foreign corporation law and of the limitations to that law resulting from the rules of interstate commerce; (3) the drastic penalties placed upon corporations for failing to take out a license. There are about sixty cases in the reports of the Supreme and the Appellate

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23. The laws of several states have attempted to reach this result with more or less success. In Arizona, for example, the provision is substantially as follows: "Persons acting as a corporation under the provisions of this statute shall be presumed to be legally organized until the contrary is shown. No persons acting as a corporation under the provisions of this act shall be permitted to set up or rely upon the want of a legal organization as a defense to any action brought against them as a corporation, nor shall any person who may be sued on a contract made with such corporation or sued for an injury done to its property or for wrong done its interests, be permitted to rely upon such want of legal organization in his defense."

Other statutes like that in Alabama provide that defects in organization may be corrected by the president filing a statement in writing setting forth the omission or error.

In California the provision is that "the due incorporation of any company claiming in good faith to be a corporation and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit, etc.

Delaware, Florida, Iowa, Kentucky, Nebraska, Tennessee and Virginia are similar to Arizona.

In Louisiana it is provided "that wherever parties have attempted to form a corporation and have executed, recorded and published a charter, all contracts made and acts done shall be treated as the contracts and acts of a valid corporation so far as affects the rights and obligations of the corporation and its shareholders, reserving, however, to the state the right to take such proceedings as may be authorized by law to enjoin or dissolve said corporation if informal, or to compel compliance with the regulations of the law."

Mississippi has a similar provision.

The provision in South Carolina is substantially as follows: "No irregularity in complying with the provisions of this article shall be held to vitiate the incorporation until a direct proceeding to set aside and annul the charter be instituted by the proper authorities of the state; and all acts done and contracts entered into shall have the same force and effect as if no irregularity had existed."

In the laws of North Dakota, Oklahoma, South Dakota, Montana, Alabama, Georgia and Idaho there are certain provisions on this subject which do not assist the common law theories and are therefore more confusing than useful.

In all of the states other than those mentioned above in this note the condition is similar to that in Illinois.

24. Probably the fundamental difficulty arises from the fact that national incorporation is impossible. But that subject cannot here be discussed.

Courts of Illinois which deal with these questions, besides a large number of cases in the federal courts defining interstate commerce. And the number of cases in Illinois seems to be growing larger with each successive volume of reports.

This litigation is largely the result of the well established interpretation of our statute to the effect that if a corporation transacts business in Illinois, without taking out a license under the foreign corporation law, then the acts of business which it does are either altogether void or else they are void in the hands of the corporation. Whether or not the party dealing with the corporation may sue the corporation on such a contract is strangely enough uncertain in spite of the numerous decisions on the general subject. In the leading case of *United Lead Company v. Elevator Mfg. Co.*<sup>25</sup> it was held that where a foreign corporation transacting business in Illinois without a license had made a contract for the sale of its goods in Illinois, it could not recover on the contract; and that it could not afterward recover on such contract by subsequently taking out a license and starting a new suit, because it was held that the contract made without a license was void. This case was based upon *Cinn. Mut. Health Assn. v. Rosenthal*,<sup>26</sup> where a note given in payment of an insurance premium was held void on the same ground. But the court did not consider in these cases what the situation would be if the suit should be brought against the corporation instead of by it. In *Watertown Fire Insurance Co. v. Rust*<sup>27</sup> this was the case. This suit was against an insurance company on a contract of insurance made in Illinois. The court here held that the corporation was estopped from setting up its own disability—a result which cannot be reconciled with holding the contract void. In accord with the Watertown case are *Cavanaugh v. Witte Gas & Engine Co.*<sup>28</sup> and *Ross v. New South Farm & Home Co.*<sup>29</sup> So that although the United Lead case is much the most recent decision of the Supreme Court, and such a contract was there held void in rather violent language; yet the Watertown case has been followed by the Appellate Court since the United Lead decision. An extraordinary feature of the situation is that there is no specific language in the foreign corporation law which forms the basis of the United Lead *dictum*. If a contract is actually void

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25. 222 Ill. 199.

26. 355 Ill. 85.

27. 141 Ill. 85.

28. 123 Ill. App. 571.

29. 191 Ill. App. 353.

when no license is taken out, this is simply a conclusion from the fact that the statute prohibits doing business without a license.<sup>30</sup>

But whether these contracts are altogether void or void only on one side (!), the result is a burden upon the transaction of business from the point of view of corporations and persons dealing with them, which can hardly be said to be consistent with sound economy. Here again the penalty does not fit the crime.

In favor of the technical condition of the law it may be urged that the foreign corporation law was enacted to protect the public against the more liberal laws of other states where corporations can be created on a basis not here recognized as sound and with powers which in Illinois are regarded as contrary to the public interest; and also in order to secure a larger revenue for the state; and that these purposes could not be effected unless the penalty for a violation of the law were made to include the possibility of this kind of collateral attack upon contracts. But it is submitted that the provisions in the foreign corporation law for a penalty by way of fine ought to be sufficient to protect the public policy and the public treasury. If a domestic corporation fails to pay its taxes, its contracts are nevertheless not for that reason void nor subject to any collateral attack. Likewise if a foreign corporation owns personal property in Illinois and fails to pay taxes upon it, its contracts are not for this reason subject to collateral attack. It is true that the taxing officials do not collect all of the taxes that they might, but hardly anyone would advocate a law which would make the contracts of all domestic corporations void as a penalty for failing to pay their taxes, and thus introduce into every case on a contract to which a corporation is a party the possibility of such collateral attack. Here indeed would be a large field for the unscrupulous.

If the foreign corporation law should be changed by a clear amendment to the effect that the failure of a corporation to take out a license should not render any of its contracts void or voidable by any party<sup>31</sup> there might indeed be a larger number of corpora-

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30. The Supreme Court has frequently stated that contracts of a similar character with that considered in the United Lead case were void: *Penn. v. Bornman*, 122 Ill. 523; *Lehigh Cement Co. v. McLain*, 245 Ill. 326; *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586; *Swing v. Thomas*, 120 Ill. App. 235; *Schueler v. C. I. & L. Ry. Co.*, 167 Ill. App. 378.

31. Such a clause exists in the law of Connecticut providing that "such failure (referring to the failure to take out a license, etc.) shall not affect the validity of any contract by or with such corporation."

In Alabama and Arizona the foreign corporation laws provide specifically

tions transacting business in Illinois without a license than there are at present; yet if the evil became material it would be subject to the following checks: (1) The state could proceed to collect a fine and to stop the corporation from transacting further business until a license were taken out; (2) any person injured or considering himself injured by the action of the corporation in this respect could compel the inauguration of a proceeding in *quo warranto* against such corporation to determine whether or not it was transacting business according to law; (3) any stockholder in such a corporation, fearing either a prosecution by the state or believing that the policy of his corporation was in general unsound, could file a bill to restrain such illegal acts of the directors or officers. And if these remedies were not pursued it would seem to be a safe conclusion that there were no public demand for the strict enforcement of the corporation act in this respect.

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that all contracts made by a foreign corporation without a license shall be void.

In the following states the statutes provide that all contracts made by a foreign corporation without a license shall be void in the hands of the corporation, but good against it: Alaska, Florida, Maryland, Massachusetts, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, Wisconsin.

In all of the other states substantially the same unsatisfactory condition exists as that in Illinois:

# CHANCERY CHAMBERS IN ENGLAND TODAY

BY SAMUEL ROSENBAUM<sup>1</sup>

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Although the Judicature Acts combined the old common law courts and the Court of Chancery into one High Court of Judicature they could not alter the essential features in which chancery business in the courts differs from business on the common law side. The latter always consisted and still does consist principally of actions for the recovery of property and actions for damages for breaches of contract or for the commission of torts; the chancery business on the other hand still is as it always was principally the equitable administration of funds and distribution of assets. The two classes of work are so different in their nature that the present King's Bench Division and the Chancery Division of the High Court are still, for all practical purposes, separate courts, except that no party is any longer prejudiced thereby. The subject-matter of the litigation is different, the court organization is different, the whole relation of the court to a litigation is different, in the two Divisions: on the common law side the interest of the court lies in clearing definite issues out of a controversy between opposing parties whose interests are mutually hostile; on the chancery side the business is mostly non-contentious and the first interest of the court is to protect the fund which is being administered or distributed. The King's Bench judge is impersonal; the Chancery judge is paternal.

In general the following matters enumerated in the Act of 1873<sup>2</sup> constitute the business of the present Chancery Division:

1. Administration of the estates of deceased persons.
2. Execution of trusts, charitable or private.
3. Wardship of infants and care of their estates.
4. Redemption or foreclosure of mortgages.
5. Sale of property subject to any lien or charge and distribution of the proceeds of sale.
6. Raising of portions or other charges on land.
7. Partition or sale of real estate.

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1. Of the Philadelphia Bar.

2. Sec. 34, Judicature Act, 1873, rearranged.



8. Dissolution of partnership, and taking of partnership or other accounts.

9. Specific performance of contracts between vendors and purchasers of real estate.

10. Rectification, setting aside or cancellation of deeds or other written instruments.

In addition to these, which are the traditional heads of equity jurisdiction, are proceedings which under many statutes are expressly assigned to the Chancery Division.<sup>3</sup>

Some important differences between the equity work in England and in the United States should be noted. A very large proportion of the work of the Chancery Division arises out of the administration of decedents' and infants' estates, and this class of business is in most American states no longer a matter of equity jurisdiction but has been transferred to special courts of statutory creation: called Orphans' Courts, Surrogate's Courts, etc.<sup>4</sup> Again, the fact that so large a part of the real property of England is subject to the trusts of some will, marriage settlement or deed, and that the creation of such trusts is so very common in English families, accounts for another very large part of the work of the Division which has no counterpart in the ordinary business of American tribunals of equity. Finally, the tort-injunction business which is so important in equity in America is not so prominent in the Chancery Division, as the jurisdiction to grant injunctions or any other extraordinary relief like appointing receivers or issuing mandamuses not only reposes now in all Divisions of the High Court but is exercised at an interlocutory stage in an action brought for the obtaining of other relief<sup>5</sup>; there is no longer a writ of injunction, but a plaintiff will on his ordinary writ of summons add a claim for an injunction to a claim for damages or for specific performance or for any other relief; or he may even apply for an injunction as a provisional remedy in the course of an action without having asked for it on the writ.

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3. Among these are actions for infringement of patents or trademarks under the Patents and Designs Act, applications under the Settled Land Acts for the sale or leasing of settled estates, under the Trustee Act for the appointment of new trustees and the making of vesting orders, under the Conveyancing Acts for the discharge of restraints and encumbrances, under the Companies Acts for many purposes, etc.

4. The Probate Division of the English High Court is resorted to only to prove the due execution of a will in order to obtain its admission to probate, or the issue of letters of administration. It does not concern itself with the administration of the estate, which is a chancery matter.

5. Sec. 25 (8), Judicature Act, 1873.

Procedurally the great difference between the work in England and in America is that there no references are ever sent to persons outside the court like the American master in chancery, who is frequently delegated to conduct the trial of the action, or to take all the testimony, or to work out the decree. All those functions are performed in England by the court itself, through several kinds of officers.<sup>6</sup>

There are six judges in the Chancery Division,<sup>7</sup> and every proceeding commenced in the Division is assigned to one of the judges according to a secret rota which makes it impossible for a litigant to choose his judge.<sup>8</sup> After such assignment the judge named has complete seisin over all steps in the proceeding; every application must be made to him, he hears the trial if any, adjudicates all interlocutory points, renders the judgment and works out the order made.<sup>9</sup> But so much of the chancery work is required to be done in chambers that to enable the judges to deal with the open-court work with continuity and without delay the six judges are linked into three pairs, each member of a pair having power to exercise all the jurisdiction of the court over proceedings assigned to either of them. The two judges in each pair then arrange among themselves so that one of them is always sitting in open court while the other disposes of matters that must go to a judge in chambers.<sup>10</sup> The theory of the Chancery Division is that every detail in the progress of a proceeding is supervised by the judge himself; in practice, however, there are so many minor matters to be attended to and so many orders which follow a regular routine that each judge is assisted by a staff of clerks who perform a very large part of his duties in chambers.

The chambers are organized as follows: to each pair of linked judges are attached four chief-clerks (who now bear the title of master), among whom the proceedings assigned to their

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6. The old masters in chancery, who were independent of the court, were abolished in 1852 (15 and 16 Vic. c. 80), and the chamber business of the court was directed to be carried on in conjunction with the open-court business. See Kerly, *History of Equity* (Cambridge, 1890), C. XIII.

7. The Lord Chancellor, who is the titular head of the Division, does not in fact sit in it.

8. R. S. C., Order V, Rule 9; Order LI Rule 10.

9. The word decree is no longer used, and the terms judgment and order are practically interchangeable.

10. The linked-judge system went into effect January 11, 1901. Its origin is described in 63 U. of P. Law Review, 402-403.

pair of judges are divided according to an alphabetical scheme.<sup>11</sup> Each master is assisted by a staff of four clerks who perform the detailed duties involved, such as sending out notices, auditing accounts, keeping books, drawing up orders, etc. By general provisions in the Rules of Court, to which are added personal orders of the individual judges within certain limits, the masters are empowered to perform most of the functions of a judge at chambers, and all chamber applications come in the first instance before a master.<sup>12</sup> A master in the Chancery Division is not, however, a sub-judicial officer like a master in the King's Bench Division, for his decisions are supposed to be those of the judge himself for whom he is a deputy, and any party dissatisfied with a Chancery master's decision on any point can have the application adjourned to the judge, to be dealt with by the judge personally.<sup>13</sup> In practice this is not so frequent as appeals from the masters on the King's Bench side are, as each Chancery master knows pretty well how his judge will feel about most of the points that come up in the day's work, and a party will hesitate to incur additional costs unless he feels sure the master is clearly wrong. The master too, if he is in doubt, may of his own motion adjourn the matter to his judge.

Each master has his own office (chambers) in the building which houses the Royal Courts of Justice, with rooms adjoining for his clerks, and his office is a regular part of the administration of justice, the entire cost of which is paid by the Treasury. The salary of a master is roughly £1,500 a year; the qualification for appointment is ten years' practice as a solicitor; the appointments are for life, and are made in rotation by the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls.<sup>14</sup>

Proceedings in the Chancery Division are, in the main, of two classes: those begun by ordinary writ of summons, which resemble common law actions in that they are frequently contentious and

11. Every proceeding in the High Court is given a letter and number, the letter being the initial letter of the surname or title of the plaintiff, petitioner or applicant. The four masters to each pair of Chancery judges divide up their judges' work according to this scheme: (1) A to D, (2) E to K, (3) L to R, (4) S to Z.

12. See R. S. C. Order LV. In Vol. 2 of the Minutes of Evidence before the recent Royal Commission on Delay in the King's Bench Division appears a full and authoritative statement by Master Fox, of the duties of a Chancery master. Parl. Pap. Cd. 6762 (1913), questions 4818-4820.

13. Dr. Gerland, in his "*Die Englische Gerichtsverfassung*," (Leipzig, 1910), p. 395 and fol., analyzes the functions of a Chancery master to show he is not a separate judicial officer like the King's Bench master, but only the deputy or assistant to a Chancery judge.

14. Sec. 19, Judicature Act, 1884.

usually go through to trial and judgment; and those begun by "originating summons," which bear no resemblance whatever to common law procedure, being usually non-contentious and seldom finding their way into open court but being completely disposed of in chambers.<sup>15</sup> In the first of these two classes there is, however, this great difference from common law actions—that less happens in the action before judgment, as a rule, than after; the judgment usually requires the taking of accounts and making of inquiries to ascertain matters like the amount of a fund or of damages or of liability, or the members of a class, or the validity of a title, or any other matters preliminary to a final adjudication of rights or distribution of funds, and then directs the "further consideration" of the action to be adjourned until the result of the accounts and inquiries has been duly certified.<sup>16</sup>

Chamber work in the Chancery Division falls therefore into three general classes, so far as the masters are concerned: (1) interlocutory proceedings before judgment in actions commenced by writ; (2) proceedings after judgment in working out the order made; and (3) proceedings begun by originating summons, which are usually completely disposed of in chambers.<sup>17</sup>

1. In the first of these three classes the functions of the master are very similar to those performed by a master in the King's Bench Division; a brief outline of them will serve to illustrate the relation of a master to a litigation. In an ordinary action as soon as the defendant's appearance is entered the plaintiff must take out a "summons for directions" and serve it on the defendant; it is a notice to the defendant to appear on the day and at the time named, before the master who has charge of the action, to receive directions concerning the conduct of the action. These directions usually consist, in the Chancery Division, of an order that pleadings should be mutually delivered at the times named in the order, and that the parties should make mutual discovery of documents; at the same time, or by subsequent applications to

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15. The first four heads of Chancery jurisdiction enumerated above are those in respect of which proceedings are usually commenced by originating summons.

16. It is impossible here to give more than the most meagre details of procedure in the Chancery Division, but some acquaintance with that procedure is essential to understanding the part played by chambers. The writer takes the liberty to recommend the two chapters on Proceedings in the King's Bench Division, and in the Chancery Division, in Mr. Jenks' edition of *Stephen's Commentaries* (Vol. III, Book V, C, XIV and C. XV), for a short but complete exposition.

17. See Daniell, *Chancery Practice* (London, now in its 8th ed.), Vol. 1, C. XVI, Proceedings in Judge's Chambers.

the master, either party may have new parties added or substituted or old ones struck out, or may obtain from the master such orders as for security for costs, transfer or stay of the action, severance or consolidation of actions, stakeholder's interpleader, inspection or preservation of property concerned in the action, certain kinds of accounts, or other preliminary matters. After a pleading has been delivered the opposite party may apply to the master for an order for further particulars of any matters alleged, or for leave to deliver interrogatories or inspect certain documents, or may ask the master to strike out any part of the pleading which is improper, or obtain leave to amend his own pleading. Later in the action applications will be made to the master for leave to get affidavit testimony of persons who can not be called at the trial, or for an order that certain issues in the action be tried before others or separately from others or in a different manner than others, or that the action be tried elsewhere than in London. Applications for time at any stage, and for any other incidental matters arising are all made to the master. These interlocutory proceedings serve to eliminate from the trial all matters not actually disputed between the parties. There are no jury trials in the Chancery Division, but occasionally an action will be referred to the Official Referee because of extreme technicality in its accounts, or to a special referee because of prolonged scientific investigation. These orders of reference are made by the master.

2. A judgment in the Chancery Division is not the simple affair that it is on the common law side. As first framed it is practically never complete, as it usually calls for accounts and inquiries which must be made for the purpose of working out the rights declared. In an administration action the judgment will direct that inquiries be made, for instance, as to the persons entitled to distribution, the creditors and debtors of the estate, the assets and liabilities, etc., and that proper accounts be prepared of the executors' receipts and expenditures; the judgment in a partnership action will direct the taking of accounts to ascertain the mutual obligations of the partners, or the selling of any property requiring to be turned into cash and accounting for its proceeds; in a partition action or an action for the raising of portions or discharge of liens upon land the judgment directs the necessary inquiries to be made to establish title, value, priority, etc., and directs the sale of the land, if proper, and accounting for the proceeds; in an action for an injunction the judgment may order an inquiry as to damages; *etc.* The forms in which these preliminary judgments may be

made are infinite, and the art of drafting Chancery judgments is highly technical.<sup>18</sup> There are twelve officers of the High Court, with an annual salary of £1,500, who bear the title of registrars, and their principal duty is to draw up in proper form the judgments rendered. They sit in the various Chancery courts (and in the Court of Appeal), changing about from day to day according to a rota, so that each registrar circulates through all the courts. Besides advising the judge on points of practice, the registrar makes a written note of the judgment verbally delivered by the judge, and bases his subsequent draft upon this note. There are no court stenographers. The solicitor who has the "carriage of the order," that is who is interested in pushing the matter through, must bring in to the registrar's chambers within a certain time all the pleadings, affidavits and other papers upon which the judgment is based, and the registrar frames the judgment with reference to these documents.<sup>19</sup>

The following form is the ordinary judgment in an administration action, and it is usually varied to fit the special case in which it comes.<sup>20</sup> Perusal of it will serve better than description to convey what is meant by a judgment directing accounts and inquiries.

After the formal beginning which recites the pleadings, and proceedings, *etc.*, upon which the order is founded:

This court doth order that the following accounts and inquiries be taken and made, that is to say:

1. An account of the personal estate not specifically bequeathed of A. B. deceased, the testator in the pleadings named, come to the hands of the defendants, B. C. and D., the executors of the will of the said testator, or any of them, or to the hands of any other person or persons by the order or for the use of the said defendants, or any of them.
2. An account of the testator's debts.
3. An account of the testator's funeral expenses.
4. An account of the testator's legacies and annuities (if any), given by the testator's will.
5. An inquiry what parts (if any) of the testator's said personal estate are outstanding or undisposed of.

And it is ordered that the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

And it is ordered that the following further inquiries and accounts be made and taken, that is to say.

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18. See the three bulky volumes of Seton, *Judgments and Orders* (London, now in its 8th ed.).

19. See R. S. C. Order LXII.

20. R. S. C. Appendix L, Form 28, as amplified in Stephen.

6. An inquiry what real estate the testator was seized of or entitled to at the time of his death.
7. An account of the rents and profits of the testator's real estate received by the defendants B. C. and D., the trustees of the testator's will, or any of them, or by other person or persons by the order or for the use of the said defendants or any of them.
8. An inquiry what incumbrances (if any) affect the testator's real estate, or any and what parts thereof.
9. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.
10. An inquiry what are the priorities of such last-mentioned incumbrancers. And it is ordered that the money to arise by the sale of the testator's real estate be paid into court to the credit of this action to an account entitled "Proceeds of Sale of Testator's Real Estate," subject to further order. And if such money or any part thereof shall arise from real estate sold with the consent of incumbrancers, the money so arising is to be applied, in the first place, in payment of what shall appear to be due to such incumbrancers, according to their priorities.

And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

The effect of such a judgment is that every trifling detail in the administration must be approved by the court, every penny received paid into court and every penny paid out only by authority of the court. It is surprising that for matters of this sort the English do not adopt our more business-like method of leaving the details of administration to an executor under bond, whose accounts are merely audited by the court. Against this it must be noted that comparatively few estates are wholly administered by the court there, and that conveyancing is extremely difficult because of the variety of successive interests that are apt to cluster about a given piece of realty, in the form of liens, trusts, and future interests.

Once the judgment is entered the next step is a "summons to proceed," by which the party interested in carrying out the order brings in before the master all parties who will be affected by it.<sup>21</sup> The master then has complete discretion as to the sequence in which the requirements of the judgment are to be carried out, although the details for each step are laid down quite fully in the Rules.<sup>22</sup> He has all the powers of a judge, so that he can summon witnesses, administer oaths, issue advertisements, require production of documents, and do anything else necessary to get in all the evidence.

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21. The procedure under this head (working out the order) has been altered very little from the form it had just prior to the Judicature Acts, and most of the present Rules on the subject are copied from the Chancery Amendment Acts and the Consolidated Orders of 1860. See 63 U. of P. Law Review, 382.

22. R. S. C. Order XXXVIII, Order LI, Order LV, especially.

He will generally accept affidavits for all the testimony required to be produced to him, except in any case where facts are disputed and it is desired to cross-examine a witness, which happens very rarely. This is the typical work of the Chancery Division—marshalling assets, distributing a fund, lifting encumbrances, partitioning realty, protecting trusts, etc.<sup>23</sup> The master sits continuously and upon taking up any one matter disposes of it completely unless for some reason it must be adjourned to obtain further facts or to await the completion of some other part of the proceeding. The minor details of checking-up accounts, sending notices, drawing up chamber orders, *etc.*, are in the province of the master's clerks; the master does none of the clerical work, but merely makes a brief note when he hears any application, to direct the manner in which the clerks shall proceed, or to inform the judge of the state of the matter. There are no stenographic reports. The master sits at a table in his office, and the solicitors who appear stand before him. Occasionally counsel will be briefed to appear at chambers, but only where there is a legal point to be argued, or where there is a complicated set of facts to unravel, which the master thinks will warrant the extra expenditure. The master has complete discretion in the first instance over the allowing of costs for the various steps taken.

When all the accounts and inquiries are completed, or, if not, have reached such a stage that some order for distribution is possible, the master will draw up a "certificate" stating the results of the inquiries, setting forth what has been done under the directions for sale or conversion or otherwise, and stating the assets in hand and the persons entitled to shares. This certificate is drawn in chambers with the assistance and approval, so far as possible, of the solicitors for all, or for the more important, parties in the cause. Unless within a certain time one of them makes application to "vary the certificate" it becomes binding on all parties. Then the action is down for a hearing before the judge "on further consideration," and at the hearing the judge will make an order for distribution according to the certificate, or will decide any points of law left open. His order may dispose of the whole matter, or may go only to a part, sending the rest back to chambers for the prosecution of further inquiries or accounts and once more adjourning the further consideration of the cause. Special points of law, such as the interpretation of doubtful clauses, the ascer-

23. For full details in brief compass see Sec. IV (ii) and (iii) of C. XV, Book V, in Stephen.



tainment of classes, the adjudication of conflicting claims, or the allowance of others, will have been disposed of prior to this event, as a rule, upon summons in chambers, where the master notes all the evidence and either decides the point or adjourns it to the judge for decision. As before the first judgment, so in the proceedings after it, all applications for any purpose are heard by the master, and only such of them adjourned to the judge as are required to be dealt with by the judge personally or raise doubtful points. Many of the applications finally disposed of by the master have to do with the payment out of court of income or capital after the rights of distributees have been declared.

3. The third branch of chamber work has become the most important.<sup>24</sup> The originating summons has provided so effective a method of obtaining equitable relief that it has almost superseded the action commenced by writ, in the proceedings to which it is applicable, and proceedings so commenced now exceed in number the total of all actions commenced in the Chancery Division by ordinary writ.<sup>25</sup> Briefly, an originating summons begins a proceeding by which, without pleadings, without a trial and without the blunderbuss order for general administration as described above, executors and trustees are able to take the advice of the court for the decision of legal difficulties arising in the administration of estates or trusts, creditors or other claimants are able to obtain an adjudication upon their claims, and the exercise of many incidental powers of the court such as to appoint trustees, order payments out of an estate, etc., is obtained. Every summons not in a *pending* cause or matter *originates* a proceeding, therefore the name. The summons sets forth briefly the claim made and the relief asked; it is served on the parties, if any, who ought to be heard in answer, and they must enter their appearances; and a time is fixed for a hearing by the master. At the hearing any evidence required is offered in affidavit form, and the master is empowered to decide the point at once, to adjourn the matter for further evidence, or to adjourn the question to the judge for decision. This procedure is followed for all matters where there is no dispute and for all matters where there is a dispute whose nature is such that pleadings are not necessary and the parties

24. An account of the origin and purpose of the originating summons is given in 63 U. of P. Law Review, 391-398.

25. In 1913 there were 2,475 proceedings commenced upon writ of summons and 2,704 upon originating summons. The latter were distributed as follows: in connection with administration of estates, 592; under the Settled Land Acts, 310; under the Companies Acts, 165; in connection with guardianship and maintenance of infants or lunatics, 52; miscellaneous, 1,585.

desire speedy action.<sup>26</sup> It was originally limited to matters arising in the administration of decedents' estates and of trusts, but has since been extended to infants' estates and mortgages. It is also specifically indicated as the proper procedure under numerous statutes which confer special powers or impose special duties on the Chancery Division.<sup>27</sup> Another useful extension of it, and the one most novel to American readers, is the Rule permitting it to be used to obtain from the court a binding interpretation of a deed, will, or other written instrument, and a declaration of the rights of the persons interested.<sup>28</sup> Questions of construction, however, can not be determined in chambers by the master, but must be adjourned to the judge after the master has noted the evidence.<sup>29</sup> In general outline the procedure on originating summons corresponds to the simple procedure upon petition that obtains in most of our Orphans' Courts, but it has been extended to cover far more ground, and it differs in the absence of a formal "answer" to the petition, and in being dealt with by a master in the first instance, not by a judge.

Appeals, as such, are never taken from the decision of a master. Adjournment of an application to the master's judge is not an appeal but merely a continuation of the proceeding, and can take place before as well as after the master has made a decision. After the judge has come to a decision, either in chambers or in open court, a party may appeal if he chooses to the Court of Appeal, under the general Rules upon appeals to that body.

The originating summons, conceived in its present form in 1883 by Sir George Jessel, the great Master of the Rolls, and the linked-judge system, invented as early as 1885 by Sir Horace, later Lord Davey, though not adopted until 1901, have completely transformed the work of the Chancery Division, so that now the business in chambers is the heaviest part of the work, is conducted rapidly and efficiently, and relieves the open business of so great a load that the Chancery Division is always more abreast of its work than any other Division of the High Court. *Jarndyce v. Jarndyce* would now be as impossible as *Bardell v. Pickwick*, for the Lord High Chancellor sitting in his blanket of fog in the Hall of Lincoln's Inn has gone to join the shade of Mr. Serjeant Buzfuz in the happy land where neither need fear any longer to hear what the soldier said, and the law courts are now among the best managed institutions in England.

26. For details of the procedure see Stephen, Book V, C. XV, Part 2 (i); or Gibson & Weldon, cited below.

27. A full list of these can be found in Gibson & Weldon; *Practice of the Courts* (London, 1912—a very useful work for students, 374 pages), Part III, C. IV.

28. R. S. C. Order LIV, A, and see Order LV Rule 3 (b) and (g).

29. R. S. C. Order LV, Rule 15.

# **PRESENT LEGAL ASPECT OF THE BILLBOARD PROBLEM<sup>1</sup>**

**BY EVERETT L. MILLARD.<sup>2</sup>**

Public opinion seems to have outrun the courts in the question of billboard control, as in many other matters. A nation-wide interest in the problem is now evidenced in its persistent agitation by municipal officers and civic organizations in many localities from coast to coast. The people have been generally awakened to resentment against the selfish imposition upon them of these unnecessary and disfiguring objects, from which there is no escape. In Chicago, five years ago, when a very progressive ordinance was under consideration, it was difficult to get a dozen people to take the time to appear against the boards at the council committee hearings, while this summer the Council Chamber itself was none too large to hold enthusiastic gatherings of individuals and delegates from all the most representative organizations in the city, gathered to support an ordinance introduced to prohibit boards in residence districts. Formerly the handful of agitators was sneered at, as composed of artists and dreamers, while today their views are treated with solemn respect. The labor organizations alone refused to interest themselves in the new Chicago ordinance, owing to the opposition of the bill posting union, which feared the loss of work for its members. If the unions can be educated to see that the disadvantages of the boards immediately affect the wellbeing of their own members, as well as of the rest of the community, there will be no contrary voice, except of those financially interested in the maintenance of the boards. The situation seems to be at a point where this feeling would be generally expressed in regulative and prohibitive law, if the way were apparent to sustain the legality of such enactments against the organized hostility of the companies.

The objections to outdoor advertisements rest upon two grounds; first, that they offend the eye, that is, they thrust themselves on your attention whether you will or not, while newspaper

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1. A paper read before the American Civic Association in Washington, D. C.
  2. Of the Chicago Bar.

or circular advertising is seen only by those who wish; second, that the structures which generally support them tend to create physical dangers and nuisances which are absent from other forms of advertising.

The fundamental difficulty found in meeting the problem has been the objection of the American courts to recognizing aesthetic considerations as a basis for regulating outdoor advertising. Offences to the eye are not considered subject to regulation in the main by our courts, although the other four senses are carefully protected. The ear, the nose, the senses of taste and touch, must not be wantonly violated by anyone, for his own profit, but sight, the greatest of them all, may be flagrantly abused by ugly advertising, and the offence dismissed on the ground that it is only to the aesthetic sense. Constitutional amendments are needed to put beauty on the protected list, unless the courts change their attitude. In time they may follow public opinion more closely, of their own accord, but they unfortunately have created much precedent, which ties their hands.

In the case of *Welch v. Swasey*,<sup>3</sup> the court upheld the right of the Massachusetts legislature to divide the city of Boston into two zones, and prescribe different limitations upon the height of buildings therein, without compensation to the private land owners, and held that if the primary and substantive purpose of the legislation is to safeguard the public health or public safety, considerations of taste and beauty may enter in as auxiliary, although property owners cannot be compelled to give up their rights for purely aesthetic objects. The principle in this leading case has been followed by subsequent decisions in Maryland, Colorado, California, Missouri, Illinois and other states.

In the *Wilshire* case<sup>4</sup> the United States Circuit Court for the Southern District of California held that the comfort and wellbeing of the people justified the regulation of obstructions to the views in and about the city; but in all the cases the courts are careful to tie down to physical objections as the chief basis for their decisions. Objections based upon the protection of beauty are only thrown in, at best, for good measure.

The Supreme Court of Illinois has, however, recently rendered a decision which points the way to effective regulation of outdoor advertising, on the safe ground of protection from physical dangers and nuisances, and takes the regulative power about as far as it can

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3. 193 Mass. 364, affirmed 214 U. S. 91.

4. 103 Fed., 620.

go, until aesthetics are recognized. The case—*Cusack v. City of Chicago*,<sup>5</sup> is now pending on writ of error before the United States Supreme Court, and if the Illinois court is sustained, will give a firm basis for future action. The city of Chicago passed a billboard ordinance in 1911, in which, among other provisions for the safety of the public, it was required that frontage consents be obtained from the owners of a majority of the property on both sides of a street in a block in which a billboard was to be erected, if such block were one in which one-half the buildings on both sides of the street were used exclusively for residence purposes. Upon an inspection made by the Municipal Art Committee of the City Club, it was found that many boards were erected without compliance with this ordinance. In one particularly flagrant case, at a turn in Sheridan road in a residence district, a board was erected which blocked the view of several miles of lake frontage from all those passing north on that important boulevard. A frontage consent had been filed with the Building Commissioner but was found to be *prima facie* and in fact insufficient. The City Club Committee induced the City Building Department to order the board torn down, and thereupon the Cusack Company obtained an injunction from the Superior Court of Cook County, prohibiting the city from enforcing this section of the ordinance. The upper court reversed the decision and dismissed the injunction on the evidence produced in the court below, holding that the city had the power to pass the regulatory ordinance in question and that it was a proper and reasonable exercise of such power.

The existence of the power to legislate upon the subject of billboards has been in less doubt than the question of what was a reasonable exercise of such power. Much evidence was introduced by the city in its thorough and able presentation of the case of *Cusack Co. v. City of Chicago*. Through newspaper publicity, the co-operation of municipal departments and of civic organizations, especially of the women, many men and women presented themselves, anxious to testify to the dangers and discomforts to home life, caused by the conditions created by the boards. It was shown that fires had been started from the accumulation of combustible material that had lodged against the base of billboards; that the residence territory of the city is not so well protected with fire extinguishing apparatus as the business district; that the boards offered a protection to disorderly and law-breaking persons and that

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5. 267 Ill., 344.

residence districts were not afforded as full police protection as other districts in the city of Chicago; that women and children are on the streets unaccompanied in larger numbers and more frequently in residence districts than in other places and that, of the crimes against women and children, the most flagrant are indecent exposure and offences against the person. It was shown that the rear of the boards was darker than the space would have been without the boards, even where electric lights were on the front surface, and that the two most important elements contributing to crimes in cities were, first, absence of police, and second, darkness. It was shown that nuisances were permitted to exist in the rear of surface billboards, and that their screen was often used for toilet purposes. Physicians testified that deposits found behind them breed disease germs which may be carried and scattered in the dust by the wind and by flies and by other insects. It was shown that dissolute and immoral practices were carried on under the cover and shield of such boards. The court quoted the case of *St. Louis Gunning Co. v. City of St. Louis*,<sup>6</sup> in holding that other structures or buildings affording a like screen from view did not tend to produce similar results, and held that it did not appear that the discretion reposed in the municipal authorities had been abused in the exercise, in this instance, of the power to regulate. It held that the previous ordinance which it had declared void in the case of *City of Chicago v. Gunning System*,<sup>7</sup> was different as having made no distinction in its restrictive conditions as to the portion of the city in which boards were located. The court further held that a requirement of frontage consents of property owners within reasonable limits is a proper mode of exercising the power of regulation vested in the municipality. Such ordinances have been upheld by this court in regard to livery stables, dram shops and garages.

From this decision, it logically follows that the city has the right entirely to prohibit billboards in residence districts, because the requirement of frontage consents in its full application means that the boards *are* prohibited in such districts, subject to the right of waiver of such prohibition granted to the property owners. Therefore, as far as Illinois is concerned, and such other states as follow this precedent, if it is sustained by the United States Supreme Court, municipalities are assured under like conditions of their ability greatly to restrict the number of billboards by shutting them out of residence

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6. 235 Mo., 99.

7. 214 Ill., 628.

blocks. It would doubtless be proper to prohibit boards on vacant blocks, if surrounding blocks were occupied for residence purposes. The Supreme Court of the United States takes a broad view of the extent of the police powers of a city, and it is probable that, with the thorough and careful preparation of a case, most courts outside of Illinois would follow this precedent and that such action would not be overturned by the highest court, as depriving property owners of their property, without due process of law.

Frontage consent provisions of ordinances have always been held valid in Illinois, on the theory that the prohibitions in the designated locations are prohibitions *in tanto*, and are not vitiated by leaving control in the neighboring owners. Courts of some other jurisdictions have, however, differed from the Illinois Supreme Court on this question. The frontage consent feature alone would be held unconstitutional in these jurisdictions, and it is, of course, possible that the Supreme Court of the United States will not sustain the Illinois Court, even in its own jurisdiction, although it is very reluctant to override the settled policy of a state, as expressed by its legislature. However, this does not affect the constitutionality of the right absolutely to prohibit boards in certain localities. The right left to neighbors to control the matter may not be valid, but the right of the legislative power to make an absolute prohibition would be sustained, unless the United States Supreme Court believes that it is an unreasonable exercise of the police powers of the city. Therefore, the absolute prohibition, without frontage consent, may rest the matter on a safer legal ground than if the prohibition is based on frontage consents.

The former cases on the subject have uniformly upheld the rights of municipalities to prohibit obscene or immoral advertising on boards. They also confirm the power to specify the minimum structural strength of boards, when reasonably exercised. Owing to the great disproportion between the surface area and the thickness of billboards and roof signs, they endanger public safety by their liability to be blown down with injury to people. It is common knowledge that roof signs are occasionally blown into the streets by gales. Hence it is the usual practice now for the ordinances to specify a construction that will withstand wind pressure of from 25 to 40 pounds per square foot.

Fire hazard is a valid objection to roof signs, which interfere with the movement of firemen and the direction of streams of water. It has also been recognized by various courts, as a ground for the

regulation of the location of boards on lots, because of their inflammable materials and of the paper, rubbish and dead woods which accumulate about them.

Power to limit the size of boards appears to be now undoubted, and the only question is as to what minimum is reasonable. The New York City ordinance of 1915 limits surface boards to 12 feet above the ground. The previous height limitation to 18½ feet in the former New York City Building Code was held reasonable and valid, in *People v. Miller*.<sup>8</sup> In the *Wineburgh Advertising Co. case*,<sup>9</sup> the Court of Appeals held that a nine foot limitation was unconstitutional and void, on the ground that the enactment appeared to be for aesthetic considerations. The same court, in *City of Rochester v. West*,<sup>10</sup> had previously held valid an ordinance of the city of Rochester, limiting boards to six feet in height, on considerations of public safety. The Wineburgh case has been criticized by several other courts, and was distinguished and explained in the Miller case in New York. The Chicago ordinance limits boards to 15 feet, 6 inches above the ground, with an open space below them of 3½ feet. The Milwaukee ordinance limits the face of boards to 12 feet and a total height to 15 feet, and this was held reasonable and valid in *Cream City Bill Posting Co. v. Milwaukee*.<sup>11</sup> An ordinance limiting boards to 11½ feet in height and 36 feet in length was sustained as reasonable in *Horton v. Old Colony Bill Posting Co.*<sup>12</sup>

The old scale of existing outdoor advertisements is too large. They could be cut down, in the opinion of many advertising men, and by the use of a few primary colors made more striking and artistic, as has been done in France and Germany.

The requirement of setting boards back from the lot line has been sustained as valid; in the important case of *St. Louis Gunning Co. v. St. Louis*.<sup>13</sup> This decision discusses with great vigor and clearness the nuisances which attach themselves to boards. Raising the boards above the surface of the ground is now a common provision, which is sustainable for obvious reasons of safety from crime, and lessening the tendency to improper use of the space back of the boards. The prohibition of boards on roofs of buildings, as provided in the Chicago ordinance, has not been attacked, and is

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8. 161 N. Y. App. Div., 138.

9. 195 N. Y., 126.

10. 164 N. Y., 510.

11. 158 Wis., 86.

12. 36 R. I., 507.

13. 235 Mo., 99.



supported by considerations of public safety, such as increased fire and wind hazards.

The regulation of billboards by taxation has long been practiced in France, Belgium and other countries, and is entirely practicable under the constitutions of some of our states, but in others must be approached with caution. The companies are probably usually not paying sufficient excise tax on their business or personal property tax on their boards, because of laxness and the difficulty in getting accurate knowledge of the details. Higher permit fees for the erection of boards and license fees for their inspection and maintenance should often be found justified merely by the expense of such service rendered, by the city, if properly administered. Increased taxes, in whatever form, would doubtless tend to diminish the number of boards in proportion.

In these utilitarian lines municipalities may, therefore, hope to accomplish great reforms, even without a recognition of the aesthetic element by the courts. Some means of extending these remedies to prevent the disfigurement of open country spaces along railroad tracks must now be found.

We have found in Chicago that it is a very different matter to get a good law on the books and to enforce it. After getting the 1911 ordinance passed, we woke up a year later to the fact that the building commissioner had made no effort whatever to enforce it, more than the billboards companies voluntarily acquiesced in. It took unofficial investigation and a campaign of newspaper publicity, before we could get action by the city sufficient even to compel the companies to go into court to test the validity of the law. The commissioner complained publicly that the law, since upheld, was invalid, and that if the City Club would not "butt in," he would get by persuasion all the observance the companies would stand for. This was despite the fact that he had before him at the time the written opinion of the Corporation Counsel that the law was valid. Here was a vivid illustration of the need of public opinion to support a law, and of the necessity of following up its administration, as well as securing its enactment.

Now is the time to take advantage of the existing feeling and proceed with the education of the municipal authorities and the public in every practicable way, and to point out the methods by which the will to regulate billboards can be expressed in effective law. Recognition of aesthetic considerations, however, seems bound to come in time, and propaganda on that basis should be continued

with hope and energy. The beauty of a city is not an idle craving of the artist and dreamer. It can be cashed in, the same as a deposit in the bank, by drafts on the visiting tourist and pleasure seeker. This is the lesson which is gradually being borne in on our hard headed business men. What city in the country would not be proud to have its streets as free from these eyesores as are those of the beautiful city of Washington, which alone of our American cities has achieved the results which have been obtained without apparent effort by many European cities?

# REVISED CIVIL PROCEDURE IN NEW YORK AS PROPOSED BY THE BOARD OF STATUTORY CONSOLIDATION

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BY HERBERT HARLEY.<sup>1</sup>

The New York Code of Civil Procedure has been likened to the banyan tree which is said by travellers to possess an extraordinary power of propagation so that a single tree, by producing new roots where the tips of branches touch the ground, grows in time into a veritable jungle. The word jungle naturally arises as a term descriptive of New York's vast incubus of substantive and procedural law woven into a distorted pattern and constituting a body of technical knowledge compared with which common law procedure, at its most intricate period, was simple and rational.

The primary idea of codification is seen to be wholly defeated in this present growth, for "the Field code, by which name the Code of Procedure of 1848 was commonly called, sought to regulate only the general features of the practice by statute, leaving the courts to control the details by means of rules."<sup>2</sup> It was the Field code which travelled to the Pacific and is still the type in twenty-five states; the Code of Civil Procedure, known also as the Throop Code, was adopted in 1887; in 1880 supplemental chapters were added and every year has witnessed some growth. In the language of the report already cited "The criticisms that were made against the Code of Civil Procedure [Throop Code] at the time of its adoption have been fully justified by experience; and ever since its enactment, speeches, addresses and reports have been made against it." This distinction between the Field Code and its successor is necessary to explain the fact that New York's experience has been wholly unsatisfactory while there has been a measure of success in the other code states, so called.

As far back as 1899 a committee on Law Reform of the New

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1. Secretary of the American Judicature Society.

2. Preliminary Statement accompanying the Report to the legislature of the Board of Statutory Consolidation.

York State Bar Association recommended "a simple practice act containing the more important provisions of the present code rearranged and revised, supplemented by rules of court."

When the Board of Statutory Consolidation was created in 1904, it was authorized not only to consolidate the statutes which had become sadly confused, but also to revise the practice in the courts. The principal duty of the board consumed a number of years, reaching fruition finally in 1911, and two successive legislatures then confirmed the duty of the board, which had naturally attained great prestige, to undertake the revision of the Code of Civil Procedure in accordance with recommendations for a short practice act and a body of rules divorced from substantive law. The board was qualified for this difficult work as no other has been. It comprised Judge Adolph J. Rodenbeck, William B. Hornblower, John G. Milburn, Adelbert Moot, and Charles A. Collin. The death of Judge Hornblower came after the board had made considerable progress. Its secretary, ever since the original formation of the board, has been Frederick Eugene Wadhams.

On April 21, 1915 the board submitted a formal report to the legislatures, consisting of three volumes. The first comprises the Practice Act proper, of 71 sections, and Rules to the number of 401 grouped in eight orders, or chapters, as follows: 1, General Provisions; 2, Commencement of Action; 3, Preparations for Trial; 5, Judgment; 6, Appeal; 7, Execution; 8, Construction. The second volume is devoted to Special Practice including the acts for the Surrogate Courts, the Justice Courts, and the City Courts. The third volume is given over to substantive law sorted out from the Code of Civil Procedure. A considerable part of each volume consists of carefully prepared notes; the total number of pages exceeds 1330.

The work reveals two principal motives, the first representing the necessity for securing rational order and technical sufficiency, while the second stands for the need of preventing a future muddling of the subject by succeeding legislatures. This second motive is of universal interest, for there is hardly a state in the Union where procedure has not suffered from the rigidity inseparable from legislated rules and from the inconsistencies and inexpertness involved in casual change and revision. In some of the common law states the legislatures have produced thousands of sections of rules, scattered through hundreds of separate acts and the courts of these states have surrendered their historic prerogative quite as completely as have those of the code states. In the preliminary report

of the Board of Statutory Consolidation made in 1912 twenty reasons are assigned for restoring to the courts the power and responsibility implied by direct control of all but the most important rules.

The conception implied in the new view is of a practice act which is a sort of legislated charter for the courts. It is presumed that it will be so broad and simple as to require a minimum of change. Conformable to this practice act the courts, through a suitable agency, will control the numerous details of procedure, subject to the will of the legislature.

This is no longer a strange doctrine in Illinois and many other states where the strangling oppression of a rigid and inconsistent system of rules has been acutely felt. It is no longer necessary to recite all of the reasons advanced in support of the principle. One of the fundamental reasons is that in no other way can the courts be held responsible for their proper functioning. In the words of the 1912 report, the system proposed "is necessary to the preservation of a due balance between the three departments of government and is in harmony with the basic principles of our constitution and the spirit of our institutions."

The proposal is also in line with the need so insistently felt at this time for increasing the administrative powers of the judiciary. However the popular view may be that the judge is an officer of almost unbounded freedom of action, the fact is that he is circumscribed to such an extent that it is, in many instances, impossible to fix responsibility; at some point at trial or during review, the trial leads into the proceedings of a separate branch of government, one whose work is now commonly marked by incompetence. It requires no close study of the subject to realize that the procedure in many states is a crazy-quilt embodying the personal views and exigencies of a horde of lawyer legislators who represent certain clients through a long career and certain constituents for a casual term or two in the legislature.

It is of interest to note the method proposed by the Statutory Consolidation Board to wean the legislature of its bad habit of tinkering with the minute details of procedure. The Revised Constitution at Art. VIII, Sec. 6, provided that the legislature should with all convenient speed act upon the report of the board, and should adopt a brief and simple practice act and a separate body of civil practice rules.

"Thereafter, from time to time, at intervals of not less than five years, the legislature may appoint a commission to consider and report what changes, if

any, there should be in the law and rules governing civil procedure. The legislature shall act on the report of each such commission by a single bill, and the legislature shall not otherwise, or at any other time, enact any law prescribing, regulating or changing the civil procedure in the Court of Appeals, Supreme Court or County Courts, unless the judges or justices empowered to make and amend civil practice rules shall certify that legislation is necessary.

"After the adoption of the civil practice rules by the legislature under the requirements of the first paragraph of this section, the power to alter and amend such rules and to make, alter and amend civil practice rules shall vest and remain in the courts of the state to be exercised by the judges of the Court of Appeals and the justices of the Appellate Divisions of the Supreme Court, or by such judges or justices of the Court of Appeals, the Supreme Court, and the County Courts as the legislature shall provide."

The rejection of the revised constitution has made the problem more difficult, but there are strong reasons for believing the principle will be accepted. Support for the measure is being diligently built up.

At the meeting of the New York State Bar Association, held in January of this year a resolution was adopted approving the report of a strong committee appointed a year before to study this subject. The report gives substantial approval to the plans of the Statutory Consolidation Board. It finds that the legislature will not be able to create a system beyond the reach of subsequent assemblies, but expresses the opinion that the end will be practically attained by including in the statutory delegation a provision that the rules shall continue until or unless amended or repealed by the judges entrusted with this power, or if by the legislature, only after a report thereon by the judges. A notable instance of the powerful tendency to rely upon authority delegated to expert hands is afforded by the Province of Ontario where Parliament has not interfered with the progress of procedural development through rules of court over a period of thirty-five years, and where an ideal system has been achieved.

The bar association report is suggestive of experience in other countries also in recommending that, in case the new system is adopted,

"There shall be selected by the association, a lawyer especially fitted by his ability in the use of lucid English and his knowledge of the general subject to devote his entire time to the subject."

Control of the rule-making power by the courts has elsewhere resulted in bringing to the actual writing of text the most skillful experts available. The perfection of the language and the natural sympathy of the court toward its own offspring constitute two powerful reasons for success.

There is no reason, then, why responsible lawyers should feel that the proposal deprives them in the slightest measure from opportunity to exert an influence in the evolution of procedure, which is an ever-growing field of law rather than the static body implied by statutory regulation. On the contrary, the bar will participate as much as ever, but the exercise of influence will shift from the less responsible element of the profession to the more responsible and conservative.

A joint committee of the legislature, appointed in 1915, is in substantial accord with the proposals. Some changes in the text will be agreed upon by this committee and the bar association committee and the present plan is to offer all the proposals of the three volume report at the 1917 session of the legislature.

LAW FROM LAY CLASSICS.<sup>1</sup>

## I.

## OF EVIL COUNSELLORS, JUDGES AND MEN OF LAW:

A CHAPTER FROM *THE SHIP OF FOOLS*<sup>2</sup>

He that Office hath and hyghe autorite  
 To rule a Royalme: as Juge or Counsellour  
 Which seyng Justice, playne ryght and equitye  
 Them falsly blyndeth by fauour or rigour  
 Condemnyng wretches gyltless. And to a Transgressour  
 For mede shewing fauour. Suche is as wyse a man  
 As he that wolde seeth a quicke Sowe in a Pan.

Right many labours now, with hyghe diligence  
 For to be Lawyers the Comons to counsayle.  
 Therby to be in honour had and in reuerence  
 But onely they labour for theyr pryuate auayle.  
 The purs of the Clyent shall fynde him apparayle.  
 And yet knows he neyther lawe, good counsel nor Justice,  
 But speaketh at auenture: as men throwe the dyce.

Such in the Senate ar taken oft to counsayle  
 With Statis of this and many a other region  
 Which of theyr maners vnstable are and frayle  
 Nought of Lawe Ciuyll knowinge nor Canon.  
 But wander in derkness clerenes they haue none.  
 O noble Rome thou gat nat thy honours  
 Nor general Empyre by suche Counsellours.

1. [This series of extracts reproduces, from time to time, some of the choice passages in lay classics where the law, or our profession, has been treated in satiric or philosophic vein. The series is re-numbered consecutively in each volume of the Review.—Ed.]

2. [*The Ship of Fools* ("Das Narrenschiff"; "Stultifera navis") was written by Sebastian Brant, of Strassburg, doctor of laws of the University of Basel, and, at some period of his life, syndic of his native city. It satirized the foibles of the society of his day—the close of the 1400s—through the allegory of a ship, crowded with fools of all descriptions, setting forth on a voyage. The book speedily achieved international popularity. The original, which was published in the Swabian dialect, at Basel, in 1494, was followed by a Latin version (Locher, Transl.) in 1497. A second Latin rendering (by Basilius Ascensius) appeared in 1507. The English version came two years later. It was the work of Alexander Barclay, a priest, born probably in Scotland, but who at that time was chaplain of the college of St. Mary Ottery in Devonshire. Barclay's version does not profess to be a literal translation. What he did was to make Brant's poem applicable to English social conditions of the period. And so well was this done that he "has, while preserving all the valuable characteristics of his original, painted for posterity perhaps the most graphic and comprehensive picture of the folly, injustice and iniquity which demoralized England, city and country alike, at the beginning of the sixteenth century, and rendered it ripe for any change, political or religious" (T. H. Jamieson, *Intro. to Paterson's Edition*, Edinburgh, 1874). The poem is divided into one hundred and thirteen sections, of which the passage here given is the second. The text is that of the first edition (1509) reprinted in the Edinburgh edition of 1874.—Ed.]



Whan noble Rome all the worlde dyd gouerne  
Theyr councellers were olde men iust and prudent  
Whiche egally dyd euery thyng descerne  
Wherby theyr Empyre became so excellent  
But nowe a dayes he shall haue his intent  
That hath most golde, and so it is befall  
That aungels worke wonders in westmynster hall.

There cursyd coyne makyth the wronge seme right  
The cause of hym that lyueth in pouertye  
Hath no defence, tucion, strength nor myght  
Such is the olde custome of this faculte  
That colours oft cloke Justice and equyte  
None can the mater fele nor vnderstonde  
Without the aungell be weyghty in his honde.

Thus for the hunger of syluer and of golde  
Justyce and right is in captyuyte  
And as we se nat giuen fre, but solde  
Nouthur to estates, nor sympell comonte  
And though that many lawyers rightwysnes be  
Yet many other dysdayne to se the ryght  
And they are suche as blynde Justycis syght.

There is one and other alleged at the barre  
And namely such as chrafty were in glose  
Upon the laws: the clyentis stande afarre  
Full lytell knowynge how the mater goose  
And many other the lawes clene transpose  
Folowyng the example, of lawyers dede and gone  
Tyll the pore Clyentis be etyn to the bone.

It is not ynough to conforme thy mynde  
Unto the others faynyd opynyon  
Thou sholde say trouthe, so Justice doth the bynde  
And also lawe gyueth the commysyon  
To know hir, and kepe hir without transgressyon  
Lyst they whome thou hast Jugged wrongfully  
Unto the hye Juge for vengeaunce on the crye.

Perchaunce thou thynkest that god taketh no hede  
To mannes dedys, nor workes of offence  
Yes certaynly he Knowes thy thought and dede  
No thyng is secrete, nor hyd from his presence  
Wherefore if thou wylt gyde the by prudence  
Or thou gyue Jugement of mater lesse or more  
Take wyse mennys reade and good counsayle before.

Loke in what Balance, what weyght and what mesure  
 Thou seruest other, for thou shall serued be  
 With the same after this lyfe I the ensure.  
 If thou ryghtwysly Juge by lawe and equitye  
 Thou shalt haue presence of goddes hyghe maiestye  
 But if thou Juge amys: than shall Eacus  
 (As Poetis sayth) hell Juge thy rewarde discusse.

God is aboue and regneth sempiternally.  
 Which shall vs deme at his last Jugement,  
 And gyue rewardes to echone egally  
 After such fourme as he his lyfe hath spent  
 Than shall we them se whome we as violent  
 Traytours: haue put to wronge in worde or dede  
 And after our deserte euen suche shall be our mede.

There shall be no Bayle nor treatynge of maynpryse  
 Ne worldly wysdome there shall no thyng preuayle  
 There shall be no delays untill another Syse  
 But outhur quyt, or to infernall Gayle.  
 Ill Juges so juged, Lo here theyr trauayle  
 Worthely rewarded in wo withouten ende.  
 Than shall no grace be graunted ne space to amende.

THE ENVOY OF ALEXANDER BARCLAY,  
*The Translatour.*

Therefore ye younge Studentes of the Chauncery:  
 (I speke nat to the olde the Cure of them is past)  
 Remember that Justyce longe hath in bondage be  
 Reduce ye hir nowe unto lybertye at the last.  
 Endeuer you hir bondes to louse or to brast  
 Hir raunsome is payde and more by a thousande pounce  
 And yet alas the lady Justyce lyeth bounde.

Though your fore Faders haue take hir prysoner  
 And done hir in a Dongeon not mete for hir degre  
 Lay to your handes and helpe her from daungere  
 And hir restore unto hir lybertye  
 That pore men and monyles may her onys se  
 But certaynly I fere lyst she hath lost hir name  
 Or by longe prysonment shall after euer be lame.

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## EDITORIAL NOTES

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### WANTED, A CHIEF JUDICIAL SUPERINTENDENT.

Lately much has been heard of "efficiency." It is a mis-used, or over-used, or misapplied word. But it has its proper applications. Judicial justice is one field for it.

We have also read much in the Bulletins of the American Judicature Society of the need for a Chief Judicial Superintendent—

instead of a Chief Judicial Umpire—who shall inspect the judicial transactions so as to observe their failures and to direct improvements which may prevent the recurrence of failures.

At present five or six sets of persons are put to work by the law to do justice according to rules. But when something goes wrong—badly and obviously—it is no particular person's power, duty, and responsibility to take hold promptly, find out where the fault occurred, and endeavor to guard against repetition of such failures. There are lawyers on both sides, a trial judge, twelve trial jurors, witnesses, an appellate court, an attorney-general and state's attorney, a supreme court and legislators. Comes a botched result; a piece of justice is turned out that is palpably damaged goods; nobody can use it; time, labor, and materials were wasted. In an efficient commercial house, this cannot happen often. Sooner or later in the system, there is a superintendent, who finds out what is the source of such defective results, and takes measures (after various experiments and inquiries, of course) to prevent such intolerable occurrences, which mar the repute and undermine the patronage of the house.

But in our justice system, what happens? Lawyers, trial judge, jury, appellate court, attorney-general, supreme court, legislator—has any one of them the power and the duty to inquire into the botch and see that something is done to guard against repetition? No, not one of them. Each one has done his conscientious industrious part somewhere along the line; but he had to stop when his own little part was done. Each lawyer pleaded, each witness testified, the jury voted, the trial judge ruled, the appellate court reversed, the supreme court reversed the appellate court, and possibly, somewhere back, the legislator had passed a statute. But when, in spite of the contributions of each one, the net result of the whole case is a botch, a palpable, unmistakable, useless, wasteful botch, and you or I take it up in the printed records and see this, and everybody can see it, and everybody realizes (*parturiunt montes, nascitur ridiculus mus*) that the product turned out by judicial justice is what the lumberman would call "culls"—what happens?

Nothing.

Who comes down from the superintendent's office and finds out what was the matter?

Nobody.

There is no superintendent.

It is *nobody's power and duty to be* Superintendent of Justice.

But it *ought* to be. And, if the reader's patience is not exhausted by finding the sermon put before the text, here is the text,—a fresh instance, taken from our latest reports, to-wit, *Pressley v. Bloomington & Normal Railway & Light Co.*, and it is last reported in 271 Ill. 622, 111 N. E. 511 (Feb. 16, 1916), thence going back through Ms. App. (May 26, 1915), 184 App. 113, 164 App. 167, and 158 App. 220.

For you must know that this bit of justice's culls goes back over *eight years*,—and *is not ended yet*, either. The man was killed on October 26, 1907. There have been four trials in the circuit court, and the judgment has once more been reversed and the cause remanded for still another trial.

First, let us sum up the facts, and then let us give the chronology of this laborious but futile effort of justice.

*Facts:* (1) The B. & N. R. & Light Co. generated electricity for sale. (2) This electricity was sold to the U. Gas & Electric Co., and went out over a high-power street-wire owned and controlled by the latter. (3) A telephone wire hanging in the street above the U. G. & E. wire fell on it and made a short circuit; the K. B. Telephone Co. was supposed to own the fallen wire, but turned out not to own it; whether the U. G. & E. wire was adequately insulated was an issue. (4) The city of Bloomington had street-lamp wires in the vicinity, and the telephone wire transmitted the high-power current to the lamp-wire. (5) The time being daylight, when the city's current was shut off, a city employee, P., was trimming the city lamp, and was killed by the transmitted current. His administratrix brought suit for the death.

*First trial* (*Presley v. Kinlock-Bloomington Telephone Co.*, 158 Ill. App. 220). The administratrix sued the Telephone Company, the B. & N. R. & Light Co., and the B. & N. R. Electric & Heating Co. Verdict for \$10,000. After verdict, suit dismissed as to the Electric & Heating Co., and judgment for \$7,000 (re-mittitur of \$3,000) entered against the other two defendants. Reversed by the Appellate Court, Third District, on two grounds: (1) The defendant was not allowed to contradict the plaintiff's evidence as to the proper and approved method of guarding high-tension wires from falling upper wires; (2) The plaintiff's given instructions as to the extent of responsibility of the several defendants for defective wires, and as to the amount of damages, were erroneous in law. Heard in the Appellate Court May, 1909; opinion filed October 18, 1910.

*Second trial* (*Pressley v. Kinlock-Bloomington Telephone Co.*,

164 Ill. App. 167). Judgment for \$9,000. Reversed on the ground that there was no evidence that the Telephone Co. owned or controlled the telephone wire, and that although the verdict as against the Railway Co. was "not unwarranted", yet since the judgment was against both defendants, the reversal must be as to both. Heard in the Appellate Court, May, 1911; opinion filed Oct. 20, 1911; rehearing denied Dec. 8, 1911.

*Third trial (Pressley v. K. B. Telephone Co. and B. & N. R. & Light Co., 184 Ill. App. 113).* Verdict and judgment for \$4,500 against both defendants. Reversed, on the grounds (1) as before, that there was no proof of the Telephone Co.'s ownership of the wire that fell, and (2) therefore, as before, the judgment being joint, it must be reversed as to both defendants. Heard in the Appellate Court October 1912; opinion filed Oct. 16, 1913; rehearing denied, Nov. 5, 1913.

*Fourth trial:* Case dismissed, before trial, as to the Telephone Co. Judgment against the B. & N. R. & Light Co., \$4,187. Judgment affirmed, on May 26, 1915, by the Appellate Court. (Digest of Appellate opinions, Ill. L. Rev., X, 28). Judgment reversed and cause remanded (opinion on Feb. 16, 1916) by the Supreme Court. Grounds: (1) mistake of pleading, because the plaintiff's replication to the defendant's second additional plea committed a departure from the declaration, in alleging a duty to shut off the current, instead of a duty to inspect and repair the wire; (2) error of ruling on proof by the trial court, on the issue of defective insulation, in refusing a peremptory direction of a verdict for lack of evidence of defect.

*Fifth trial:* 19—.

*Sixth trial:* ?

Now, we do not pretend to assert that justice plainly points here to either party as deserving a judgment on the merits of fact and law. There is ground for arguing that, in the matters of substantive law and procedure involved, as well as in the handling of the case, defects are apparent. But we do assert this: That justice requires that a case of this kind be tried out and settled without taking five trials, four or five appeals, and nine years of time. We assert that such a product as this, judged by the reasonable standards of efficiency, is simply a botch. Whether the standard of efficiency be the industrial one of a modern department store, or the ideal one of Plato's Republic, such a result measures into the culls class by any standard, and should cause us to reflect seriously on our system.

Nor do we assert that the fault lay in any particular quarter, whether in the law, or the lawyers, or the witnesses, or the clerks, and sheriffs, or the juries, or the judges. Very likely it was the fault of nobody in particular. We don't know. Probably nobody knows.

But our only point is that it is *nobody's duty and power to find out*.

What we preach is a Chief Judicial Superintendent, who shall have the power and the duty to inquire into each and every sort of botch-product of our justice-system, and to take measures to improve it against the recurrence of such failures. When the people of Illinois bring themselves to permitting and demanding such an innovation, they will be in a fair way of getting substantial improvements in their justice,—but not before then.

J. H. W.

## COMMENT ON RECENT CASES

NEGLIGENCE—LIABILITY OF VENDOR OF ELECTRICITY FOR DAMAGE CAUSED BY VENDEE'S NEGLIGENT WIRING.—"Commonly," said Mr. Justice Holmes, in one of his philosophical opinions, "when a new control comes in, the former responsibility is at an end." (*Glynn v. Central R. Co.*, 175 Mass. 510, 56 N. E. 698). "When a person is to be charged because of the construction or ownership of an object which causes damage by some defect, commonly that liability is held to end when the control of the object is changed."

Apply this to the manufacture and sale of an electric current. The maker generates it at the dynamo-building, where there is a meter and a cut-off; the distributor receives it, by another meter and cut-off, on a wire-system, which he owns and controls, going through the streets. One of these wires is defectively insulated or guarded, so that the fall of a third person's telephone wire makes contact and transmits a lethal current to a fourth person's wire, on which a fifth person is lawfully working. The worker is killed. Is the generating party responsible for the result? (*Pressley v. Bloomington & Normal Railway & Light Co.*, 271 Ill., 622, 111 N. E. 511, February 16, 1916). The Supreme Court of Illinois, answers this question in the negative, following *Hoffman v. Leavenworth Light, Heat & Power Co.*, 91 Kan. 450, 138 Pac. 632, one of the few prior decisions on the subject.

What are the conditions that affect liability? Be it noted that the defective wire is not the intrinsic cause of the harm (even assuming that an unguarded high-current wire is defective from the mere fact it is crossed above by a telephone wire which may sometime break and fall). The dangerous element is the wire plus the current. Of these two items the transmitter supplies and owns the wire, and controls by cut-off the current; the generator also controls the current. Thus the dangerous element as a whole is controllable by either, the wire part of it is controllable by one only.

The two conditions which affect liability are (1) the control, (2) the knowledge of the danger, either actual or obtainable.

(1) Ordinarily, control, where the element is dangerous, is enough to make liability. Here, for instance, the transmitter vendee, owning and controlling both wire and current, would be liable, because by his control he could obtain knowledge, and should have done so, of the defective condition. But the generator had control of one item only, viz.: the current, and had no control of the wires and thus no right and therefore no duty to inspect them and by inspection to obtain knowledge. Thus this seems to be an exceptional case—an exception to Justice Holmes' general statement—in that though control of one item of danger remains in the generator's hands, yet it is not a control that should carry responsibility.



(2) The second condition, knowledge of the danger, was not found in fact; if it had been, the maker would have been liable.

Nor is it a case for imputing obtainable knowledge, because this could be obtained only by inspection, and to require the vendor to inspect the vendee's apparatus does not seem reasonable.

Such appears to have been the doctrine of the opinion, somewhat expanded and transmogrified, to be sure, but not altered in its essence.

J. H. W.

CORPORATIONS—ULTRA VIRES ACTS—PUBLIC POLICY.— *North Ave. B. & L. Association v. Huber*, 270 Ill., 75, illustrates how a bad doctrine may in the course of time drive law and justice to opposite poles. A corporation, having no power to loan its funds to others than its members, is denied the right to foreclose a defaulted mortgage which it had purchased. The case involved two problems, (1) The power of the corporation, (2) The penalty for an abuse of power. One rebels at the court's narrow view of the first problem. Corporate powers cannot be measured with a yard stick. They are as varied as are human activities, and require for their interpretation broad and sympathetic business understanding. Today the citizen encounters the corporation wherever he participates in human activities. In his religious, charitable, political and business activities, the corporation is one of his most potent and useful instrumentalities. He has the right, therefore, to insist that so far as possible the courts shall not create or leave open for him pitfalls into which he will be constantly straying unless led by the hand of one learned in the law. Can it fairly be said that in dealing with the problem of *ultra vires* our courts have met his demand? Must he not only thus be led, but is it not almost the case of the blind leading the blind? The law of *ultra vires* as developed by our American courts, far from encouraging righteousness (which we assume to be one of the law's highest aims) makes for unrighteousness. The plea of *ultra vires*, whether invoked by or against the corporation, is usually opposed to good ethics and morality. The books are full of cases of shocking injustice resulting from its use. The doctrine of *ultra vires* is one of the most unfortunate contributions our courts have made to American jurisprudence. It finds its source not in any statutory enactments, but in an almost instinctive antagonism in the minds of judges, to an expansion of corporate powers. The development of this antagonism in England is easy to understand. The English attitude to the modern business corporation was non-receptive. Incorporation until 1862 was difficult and costly. English business resorted to all sorts of devices to obtain the advantage of corporate existence, which Parliament granted quite grudgingly, and when general incorporation did come with the enactment of the Companies Act of 1862, there set in a tendency to strict construction; witness the clear distinction between the general capacity of the charter company and the limited capacity of the statutory company.

In the United States, however, the corporation found a ready welcome, legislatures incorporated freely, and to facilitate the process very early enacted general incorporation laws, so that the privilege might be open to all citizens on equal terms. But there developed in the United States an anxiety, not perhaps consciously expressed, but nevertheless apparent, lest the corporation become a dangerous power in the community, an anxiety becoming more and more pronounced as corporations increased in number, and gained in wealth and power, and reaching its greatest intensity as the corporation became a ready instrument in the formation of the modern trust or monopolistic combination. The fruit of this anxiety was a tendency on the part of the courts to curb the corporation, upon the theory that an abuse of corporate power is *per se* against public policy. Public policy is a much abused term. It has covered up many sins of omission and commission, it is almost always debatable, and for that very reason a rather unstable foundation upon which to rest a very solid structure.

A very superficial analysis should show how fundamentally false is the notion that an exercise of corporate power in excess of charter power is, because of the very fact of excess, against public policy. So called *ultra vires* acts may, for convenience, be divided into the following classes:

1. Acts in disobedience of express statutory mandate.
2. Acts in violation of an established public policy.
3. Acts which are not within the express or implied powers contained in the statute and charter, or certificate of incorporation.

The first two are not properly *ultra vires* acts. They are illegal, but *ultra vires* only in the sense that the corporation, no more than an individual, may disobey statutory mandate, or violate public policy. And the courts in dealing with corporate acts of these two classes should determine their validity, or the consequence of their invalidity, free from any consideration that they are at the same time unauthorized by the corporate charter. An excellent illustration of this can be found in the case of *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U. S., 24. The lease in that case was declared void, (1) because the lease itself was against public policy, (2) because the corporation had exceeded its charter powers. If the first reason is good, then the second is of no consequence. If it is not good, then the court is forced to say that the act, though in itself not in violation of any public policy, is against public policy because, forsooth, the corporation did not take the precaution by an easily obtainable amendment to its charter or articles of incorporation to include the power with its other powers.

This brings us to the absurdity of the whole modern doctrine of *ultra vires*.

Every general incorporation act defines for what purposes a corporation may be organized, and this involves, of course, by implication every power which a corporation may exercise. To the extent, then, that any purpose is withdrawn, or any power is

denied, this constitutes a clear declaration that it is forbidden, and its inclusion or exercise is against public policy. As to everything else the choice rests entirely with the corporation and its members. The state and public are not in the slightest degree involved. The object, the powers are lawful, the state welcomes their exercise.

It seems manifest that a different treatment should be accorded acts which the state has forbidden, and acts which the state has welcomed. But it may be said the state, though it welcomes the inclusion of the particular purpose in a charter, has imposed certain conditions before it may be enjoyed, and until they are performed the purpose is unlawful. First amend, then the corporation may act. There might be force in this argument were it not for the almost universal recognition of the *de facto* corporation, and its immunity from collateral attack. Such an organization admittedly has failed to comply with the conditions precedent to the exercise of any corporate power, and yet it may unmolested exercise all its powers, even that of eminent domain, until the state interferes.

No, the fact is that the courts in their failure to make this distinction have made a sorry mess of the whole business of corporate powers, so that today, the layman, the lawyer, however conscientiously he desires to conform to the law, is at the mercy of a narrow judicial interpretation of what is after all in the main a matter of sound business judgment and discretion.

This brings us back to the case which we started to discuss (1) The power of the Building and Loan Association to invest its funds in a real estate mortgage. We start with the assumption that the court's interpretation of the act for the incorporation of Homestead Loan Societies clearly denies to them the right to loan funds to non-members. No reasonable mind can quarrel with the court on that proposition. These societies are given peculiar privileges which ordinary lenders are denied, and solely because they are mutual cooperative organizations. Their loans, which would ordinarily be usurious, are not so in fact, because the borrower himself becomes a beneficiary of the usurious interest. It necessarily follows that the legislature has clearly implied that loans to non-members must not be made, and that no such purpose or power could by original or amendatory inclusion be inserted in the articles.

Again, no device to circumvent this denial of power could be sustained, and therefore a so-called purchase of a mortgage loan through the medium of a stranger who was in fact the mere agent of the corporation in thus lending its funds could not make the unlawful employment of its funds lawful.

But does it follow that the purchase in good faith of a mortgage with surplus or idle funds is equally unlawful? If so, where shall the line be drawn? Would the purchase of a municipal or a railroad bond, be unlawful, or perchance the deposit of the fund in a savings bank? Does not this *reductio ad absurdum* indicate a fallacy somewhere in the arbitrary declaration by the court of the illegality of the transaction, without a further investigation of

the good faith of the purchase? Universities, hospitals, and other eleemosynary corporations, are not organized to lend money, and yet no one disputes their power to employ their endowment funds by way of loans and purchase of securities. A mercantile corporation is not organized to lend its funds on mortgages, and yet would the court deny it the right to invest its surplus temporarily in securities, mortgage or otherwise? The manner of the employment of idle funds is a matter for sound business judgment, not for judicial interpretation. To the extent, therefore, that this decision brands such a *bona fide* purchase even by a Building and Loan Association as unlawful, it seems unfortunate.

(2) This brings us to the penalty imposed by the court, to wit, the denial of the right to foreclose. What has already been said indicates the line of approach to this problem. Had the loan been direct to the mortgagor by the corporation, the court might stand on solid logical ground in refusing to foreclose the mortgage, and would consistently be following its own previous decisions. Having adopted the view that an *ultra vires* contract is illegal and void (*National Home B. & L. Ass'n v. Home Savings Bank*, 181 Ill., 35), it would be anomalous for a court of equity to enforce the illegal contract, though that anomaly seemed to have no terror for the United States Supreme Court, *National Bank v. Mathews*, 89 U. S., 621.

But the decision goes far beyond this, and holds that a contract lawful in itself cannot be enforced because the corporation in becoming the owner of the mortgage committed an unlawful act. Where else in the law can be found so peculiar a doctrine, that a court will inquire into the method of the acquisition of property, when enforcing the rights of ownership? For instance, suppose *Jones* had acquired the same note and mortgage as a result of a game of chance, would a court of equity, at the instance of a stranger to the game, deny his ownership because of the illegal method of acquisition? The only justification for such a rule as against the corporation would be that the title to the mortgage did not pass. There is little if any warrant for such a doctrine; on the contrary, the overwhelming weight of authority in the United States is against it; not only that, but justice and reason are against it.

An *ultra vires* acquisition of land, generally throughout the United States, vests title in the corporation, even in Illinois, notwithstanding the peculiar exception there found when there is an express quantitative limitation. *St. Peter's Roman Catholic Church v. Germain*, 104 Ill., 440. A collateral attack upon the validity of the title based upon a mere *ultra vires* acquisition, not upon an express statutory prohibition, with the penalty of invalidity attached, (even with such a penalty the legislative intent to render the conveyance void must be unmistakable, *Fritts v. Palmer*, 132 U. S., 282), has never found favor in the United States. The very absence of authority as to the permissibility of such an attack upon the *ultra vires* acquisition of personal property, indi-

cates the general acquiescence in the same rule as to this form of property. Any other rule would be intolerable. Unfortunate as is the rule in Illinois and other states that an *ultra vires* contract, even though fully performed, may be collaterally attacked, the extension of this rule to embrace a collateral attack upon the title acquired as a result of an executed *ultra vires* contract, would plague not merely the corporation, which the court seeks to punish, but the community which the court seeks to protect. The law of *ultra vires* has brought confusion enough into the business community, and its further drastic extension for the purpose of compelling good corporate behavior had better be left to statutory rather than judicial regulation.

When one reviews the history of the attempt by the courts to curb corporate excesses by the use of the doctrine of *ultra vires*, one must admit that it has been a failure. Corporations, though they have been dubbed "artificial entities, invisible, intangible and existing only in contemplation of law," are none the less aggregations of living, thinking, striving human beings. They follow the line of least resistance, and when they encounter hostility, statutory and judicial, they remove themselves as far as they can from its influence. And so we see corporations, great and small, running for protection to small but generous states, like Delaware, West Virginia, Nevada, and others, which endow them with unlimited power and privilege and to the extent to which such shelter does not give them complete protection, they continue to act *ultra vires* where business necessity or gain requires, assuming the consequences as a part of the ordinary risks of business.

It is to be hoped that some day the legislatures of the various states, particularly of Illinois, will revise their antiquated corporation laws, and in so doing will apply the pruning knife to the law of *ultra vires*.

C. G. L.

**CARRIERS—CARMACK AMENDMENT.**—In *Looney v. Oregon Short Line R. R. Co.*, 271 Ill. 538, the Supreme Court held, reversing the Appellate Court, that the defendant, a second carrier, was not liable under the Carmack Amendment for injury to the goods, occurring on the line of a succeeding carrier, notwithstanding that the second carrier on receiving the goods from the initial carrier, took up the original bill of lading, issued by the initial carrier, and issued a new one for the remainder of the transportation. The Appellate Court deemed that the issuance of the new bill of lading created a new contract of interstate transportation in which the defendant carrier was the initial carrier under the Carmack Amendment. *Looney v. Oregon Short Line R. R. Co.* 192 Ill. App. 273. The Supreme Court repudiates their view, and holds that under the wording of the Carmack amendment the carrier originally receiving the goods for interstate transportation is the only one upon whom liability is imposed by the act for the entire transportation. The court holds that the purpose of the act was to

afford shippers a remedy against the first carrier, in the case of interstate transportation over lines of connecting carriers, where the responsibility for loss or injury to goods would be hard to locate, and that the ruling of the appellate court was not in harmony with this purpose. The Supreme Court approves and follows the case of *Hudson v. Chicago, etc. R. R. Co.* 226 Fed. 38, which had declined to follow the opinion of the Appellate Court, and had ruled in accordance with the opinion of the Supreme Court.

L. M. G.

**PURCHASE FOR VALUE WITHOUT NOTICE—VALUE—EVIDENCE.**

—In *McGuire v. Gilbert*, 270 Ill. 160, the state Supreme Court held that a grantee of land seeking to defeat the equitable interest of a third person, valid as against the grantor, on the ground that he, the grantee, purchased the land and acquired the legal title thereto for value and without notice of the equitable interest, has the burden of proving both that he paid value and that he had no notice. The court also held that the recital of a valuable consideration in the deed to the grantee was not sufficient proof that he actually paid value.

L. M. G.

**PLEADING—STATUTE OF LIMITATIONS—PERMANENT OR TEMPORARY INJURY—PLEA OF NON ACCREVIT.**—*Wheeler v. Sanitary District of Chicago*, 270 Ill. 461, presents a question of the application of the rule as to pleading the statute of limitations adopted in *Vette v. Sanitary District of Chicago*, 260 Ill. 432. In the latter case it was said: "In an action brought to recover damages for a permanent injury to real estate the formal plea of the Statute of Limitations [viz., that the cause of action did not accrue within five years] may be interposed and a demurrer will not lie. On the other hand if \* \* \* a suit is brought to recover damages for a temporary injury to real estate or for a continuing trespass alleged to have occurred within five years, then, if the Statute of Limitations is pleaded, the mere formal plea is not sufficient but special facts must be set up to show wherein the suit is barred, as, for instance, facts which, if proven, would show that the injury for which recovery is sought was a permanent injury, and not, as the declaration alleged, a temporary one." From the subsequent language of the opinion, we take the rule to be that where the declaration shows that the plaintiff is proceeding for injuries which are the consequential result of a permanent injury sustained before the statutory period, *i. e.*, discloses that the plaintiff's case is barred, then the plea of *non accrevit* is good, but if the fact of a precedent permanent injury of which the grievances alleged are but the consequential result must be shown by the defendant, then this fact must be specially alleged. No such rule can be found in any of the common law books. "From the passage of the statute down to the present case," said Abbott, C. J., in *Dyster v. Battye* (1820) 3. B. & Ald. 448, "the invariable form of pleading the statute

to an action upon the case for a wrong \* \* \* has been to allege that the cause of action did not accrue within six years next before the commencement of the suit." To be sure, the distinction between permanent and temporary injuries in the sense implied in the holding appears, for the first time, to have been formulated by the Supreme Court of New Hampshire in *Troy v. Cheshire Railroad Co.* (1851) 23 N. H. (3 Fost.) 83, but that doctrine concerns what is merely one aspect of the general question as to when the cause of action is created by the original tortious act and when by the ensuing damage. In none of the English cases where this question was involved can there be discovered any trace of a requirement that a plea of the statute set out special facts. See *Howell v. Young* (1826) 5 B. & C. 269; *Viollett v. Simpson* (1857) 8 E. & B. 344; and the leading case of *Bonomi v. Backhouse* (1858) E. B. & E. 622, *sub nom.* *Backhouse v. Bonomi* (1861) 9 H. L. Cas. 503.

The truth is that the rule is based on a misconception of the office of the plea. What apparently has happened is that the court, misled by considerations relating to pleading the statute to an amended count introducing a new cause of action, has proceeded on the theory that the plea of *non accrevit* can never be good unless the *record* shows it to be *well founded*. In the case of an amended count introducing a new cause of action, the necessities of the peculiar procedural situation there developed has required it to be held that, on demurrer to the plea, the question of whether or not the cause of action is barred is determinable by the court, as a question of law, from a comparison of the original and amended counts. *Fish v. Farwell*, 160 Ill. 236. But that is something quite different from determining whether the plea is well founded or not by an examination of the allegations in the single count to which it is opposed. From the rule as laid down it would logically follow that, if a declaration on a promissory note so alleged the date of its maturity that the action appeared to be barred, the general plea would be good, whereas if the date alleged was within the statutory period, the defense could only be by a plea specially stating the date for which the defendant contends. Such manifestly is not the law,—and yet the cases are identical in principle. Were it possible to take advantage on demurrer to the declaration of the fact that its allegations disclosed a barred cause of action there would be some approximation to correctness in a holding of the kind under discussion, but the rule has long been otherwise. *Bremion v. Evelyn* (1675) C. B., cited in *Lee v. Rogers* (1675) 1 Lev. 110; *Gould v. Johnson*; (1702) 2 Ld. Raym 838; *Guntton v. Hughes* (1899) 181 Ill. 154.

In the absence of any citation of authority in support of the holding, its genesis can only be the subject of conjecture. In *Jones v. Sanitary District of Chicago* (1912) 252 Ill. 191, a plea setting out special facts was employed, but there is no discussion as to the reason for its use. We strongly suspect, however, that the doctrine of the *Vette* case was derived from *Jenks v. Lansing*

*Lumber Co.* (1896) 97 Iowa 342. In that case the answer alleged "that the cause of action set out in the third count of plaintiff's petition [one alleging a continuing nuisance] arose and occurred to her more than five years before the commencement of this suit, and is barred by the statute of limitations." A demurrer to this was sustained by the lower court. "The division of the answer to which the demurrer was sustained," said the Supreme Court, "was intended to apply to a case where permanent structures are erected, and the damage is original, and the statute commences to run at once. \* \* \* If it was the purpose to present that question, the answer should have set out the facts upon which it relied, as a bar to the action. The defense of the statute of limitations is an affirmative one and the party pleading it must affirmatively show the facts constituting the bar. *Harlin v. Stevenson*, 30 Iowa 371; *Tredway v. McDonald*, 51 Iowa 663. \* \* \* The answer is but the statement of a legal conclusion, and the demurrer thereto was rightfully sustained." Thus, from all appearances, a single effect of what seems to be a general rule of pleading the statute under the Iowa code is engrafted on a system to which that general rule is utterly alien. Westminster Hall would have echoed with inextinguishable laughter had any one there demurred to a plea of *non accrevit* on the ground that it stated a legal conclusion.

That a rule so well calculated to introduce confusion and perplexity should not be consistently adhered to is not in the least surprising. And in the principal case—*Wheeler v. Sanitary District of Chicago*—we find the court preventing its application only by ignoring a well settled tenet of pleading. Here the plaintiff commenced his action on March 22, 1912, counting in his original declaration upon permanent injuries occurring at the opening of the drainage canal. By an amended count filed on December 13, 1913, he alleged temporary injuries sustained during a period of five years next before, not the filing of the amendment, but the commencement of the suit. To this amended count a formal plea of *non accrevit* was interposed, demurred to, and the demurrer sustained. This, the court holds, was wrong. The rule of the *Vette* case "is not applicable here because the injury is not alleged to have occurred within five years next before the filing of the amended declaration but within five years before the commencement of the suit. \* \* \* All of the injuries occurring prior to December 13, 1908, would be barred by the statute of limitations. \* \* \* The only method in which the defendant could have the benefit of the statute for that part of the injuries which were alleged to have occurred prior to the statutory time before the filing of the amendment would be by pleading the statute." That is to say, as to the period from March 12, 1907 (the beginning of the five year period alleged) to December 13, 1908 (the beginning of the five years next before the amendment) the plea, on demurrer, must be held good, because it appears to the court, as a matter of law, on comparison of the original and amended counts, that the plaintiff



is barred, just as in the ordinary case where an amendment, setting up a new cause of action, is filed after the statute has run,—and consequently no special facts need be alleged in the plea. This is perfectly logical, but what as to the residue of the five years—the period from December 13, 1908 (the beginning of five years next before the amendment) to March 12, 1912 (the date of commencement of suit)? As to this period the defense can only succeed on the ground that the injuries alleged are permanent and not temporary as alleged in the declaration—precisely the situation which by the rule of the *Vette* case calls for a plea of special facts. Plainly as to these last mentioned injuries the plea of *non accrevit*, under that rule, is bad. Now it is familiar learning that a plea bad in part is bad for the whole (1 Wms. Saund. 28), and to this principle a plea of the statute of limitations is no exception. *Webb v. Martin* (1672) 1 Lev. 48; *Pennsylvania Co. v. Sloan* (1888) 125 Ill. 72. Being insufficient as to the part from December 13, 1908 to March 12, 1912, it follows that the present plea pleaded, as it was, to the whole charge, ought to have been held insufficient as to all. Pleas alleging special facts, it is true, were also filed in this case and apparently to the amended count. But their allegations, on plain principles, would not aid the formal plea. In all likelihood, the latter was put in solely for the purpose of taking advantage of the bar disclosed by a comparison of the original and amended declarations. If so, it should have been properly confined by its allegations. Whatever its purpose, it was clearly not a good answer to the whole charge. The only explanation of the decision is that to avoid penalizing the defendant for an error directly attributable to the rule of the *Vette* case, the court saw fit to pass by the fault in silence. Further difficulties will not be slow in presenting themselves as long as that rule is permitted to stand.

— R. W. M.

## BOOKS AND PERIODICALS

### BOOK REVIEWS

GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN. By Thomas W. Palmer, Jr. Washington: Library of Congress, 1915. Pp. 6+136+20 (glossary) + 9 (index).

This work is the third valuable contribution in a valuable series. It was preceded by a similar guide to the legal literature of Germany (1912), and a bibliography of international and continental law (1913). The present guide is to be the foundation of another book, now in preparation, dealing with the legal literature of Latin America. Among readers already familiar with the earlier issues of this series, hardly anything more need be said, when it is stated that the present contribution is executed on the same general plan, and under the able direction of Dr. Borchard, the law librarian of the Library of Congress.

The author, after investigating his subject in American libraries, rounded out and completed his labors by a visit to Spain, where he consulted nearly a score of eminent lawyers, jurists, and librarians. He has done his work well, and his book fills a unique place in our literature. Books about books are frequently more interesting than the primary sources. This observation holds in this case; and, at any rate, after having had the advantage of such a summing-up of the whole field of books, and something of an outline history of the external legal development of the country, we may, we think, approach the subject itself, in any one or more of its numerous and complex aspects, with a feeling of intelligence, and a stimulated interest.

The author has entered some 600 titles in his survey. It is not claimed that this exhausts the legal literature of Spain; but it no doubt resolves the problem, in substance, which is set out in the preface. Judgments are frequently ventured as to the value of books under discussion. We would, of course, as readily expect a Spaniard to be able to do the same thing in the field of Anglo-American literature after a short visit in this country. It is perhaps unavoidable that such judgments, if based on the author's personal reading of the literature surveyed (which is manifestly impossible), would require explanation, not on the basis of conscious reasoning, but rather as products of intuition. Naturally, therefore, the author has adopted the current prejudice, or judgment, as the case may be, of the Spanish authorities with whom he has come into contact. In one or more cases, it is possible that the particular Spanish authority could be named, who has in this useful manner transmitted to a wide circle of American readers, that appraisal of a book or of books which now receive an official rating. No one will take this as criticism, since it is well known to all persons, and perhaps, especially, to reviewers of books how difficult

it is, even after a close reading of a volume, to deliver an unqualified sentence of life or death, after the approved gladiatorial manner. And, moreover, in the one or two places where the present writer would venture to have any opinion of his own, he does not find anything seriously to complain about.

As a guide, merely, to Spanish law writing and legislation, from a modern and practical point of view, this effort may be highly commended, and we may look forward with satisfaction to the forthcoming publications in the series.

A. K.

**PATHOLOGICAL LYING, ACCUSATION, AND SWINDLING: A STUDY IN FORENSIC PSYCHOLOGY.** By William Healy, A. B., M. D. and Mary Tenney Healy, B. L. Boston: Little, Brown and Company, 1915. Pp. x, 286.

This volume possesses special interest as being the first of the series of Monograph Supplements to the Journal of Criminal Law and Criminology, whose publication has been authorized by the American Institute of Criminal Law and Criminology. It should be gratifying to all thoughtful men that the scientific study of criminology has so far advanced in this country as to make the series both possible and necessary. We have too long been dependent upon European research for our information in this field.

The volume likewise possesses considerable intrinsic interest to psychologists and an obvious interest to lawyers, jurists, police officials, penologists, charity workers and all others whose calling brings them into contact with human testimony and with the practical necessity of disentangling truth-telling from lying.

The general plan of the book may be gleaned from the distribution of space—introduction, 14 pages; summary of studies of other investigators, 28 pages; detailed account of 27 cases studied by the authors, 207 pages; summary of results, 32 pages.

The particular type of lying that is singled out for study as being properly included under the term "pathological lying" is indicated by the definition: "Pathological lying is falsification entirely disproportionate to any discernible end in view, engaged in by a person who, at the time of observation, cannot definitely be declared insane, feeble-minded, or epileptic." Similarly, pathological accusation "is false accusation indulged in apart from any obvious purpose. Like the swindling of pathological liars, it appears objectively more pernicious than the lying, but it is an expression of the same tendency. The most striking form of this type of conduct, is, of course, self-accusation." It will be seen that these definitions rule out of consideration by far the greater number of all liars, accusers and swindlers. If any motive appears that can be construed as at all reasonable and sufficient explanation for the conduct, the case falls outside of the group under consideration. Likewise, if the lying merely expresses a systematized delusion, as in forms of insanity, or if it is a consequence of the excessive stupidity of the imbecile, it is not "pathological lying" in the sense here

defined. The authors think that about 8 or 10 only of the 694 male and 306 female offenders aged 6 to 22 years that they have examined, represent true examples of pathological lying. (Naturally it is not meant that fantastic lying may not be met with in the insane, indeed, a section of the decision is given over to "border-line cases" in which lying and accusation are conjoined with more or less well-defined mental disturbances.)

In the very nature of the situation the task set by the authors is full of difficulties, since they are seeking to discover the cause of an apparently motiveless form of behavior and to unearth the truth about individuals whose chief characteristic is a proneness to lie! It is no criticism of the work before us, then, to state that we finished our reading feeling that we were still pretty much in the dark as to the psychology of pathological lying.

It is risky to generalize from a score of cases. If we take this risk, we discover that a marked tendency toward verbal readiness, a sort of linguistic fluency, is one trait of the pathological liar, that the lying usually makes its appearance insidiously in the early formative years, that it appears far oftener in women than in men, that "very early untoward sex experiences" and repressed mental conflicts are frequently to be noted, that swindling, stealing, accusation, running away from home, itineracy, and other forms of delinquent behavior form a natural sequence to the condition, that the lying may appear in persons seemingly normal in all other respects, but that bad heredity (alcoholism, insanity, syphilis, or at least neuropathic taint in the parents) is present in nearly every case, though there is no evidence that the pathological lying itself is directly heritable. As to amelioration or cure, the authors are "inclined to believe that well-calculated, constructive efforts will achieve goodly success among those who are mentally normal."

This last statement (with which the book closes) really contains the whole issue. The authors insist that they have contributed to the discussion of the topic primarily by having defined true pathological lying as limited to motiveless (and in this sense pathological) lying in individuals not otherwise abnormal (insane, epileptic, feeble-minded). Yet we discover, as just indicated, that hereditary taint is almost invariably present, and that repressions, mental conflicts, delinquency and abnormal sex experiences are common features in the nineteen cases classed as 'normal' individuals. These persons are, we feel, designated as normal persons exhibiting a curious abnormality only by a certain stretching of the terms. Moreover, a good portion of the diagnostic examinations are devoted to discovering a cause for the "motiveless" lying.

Possibly this objection is hypercritical, after all. So, too, the objection we feel toward the constant use of the term "findings" to characterize the data or the results of psychological experiments. A real objection, however, is to be voiced against the form in which the twenty-seven cases are presented: in nearly every description we have been annoyingly disturbed by being unable to know whether

what we were reading was the patient's lie or the investigators' factual discoveries about the lie. It would have been advisable to have had the text read before it was printed by some person not acquainted with the data in order that this difficulty might have been remedied.

It is scarcely necessary to repeat to the readers of this magazine that "the legal issues presented by pathological lying may be exceedingly costly" and that the well-equipped lawyer ought to be familiar with the general phenomena comprised under the term.

GUY M. WHIPPLE.

University of Illinois.

**THE HAGUE ARBITRATION CASES.** By George Grafton Wilson. Boston: Ginn and Company, 1915. Pp. x, 525.

This is a case-book or perhaps rather a volume of reports and includes the fifteen cases on which The Hague Tribunal has acted. In each case the compromise or special agreement under which the case has been submitted is given and the subsequent award. When there is no official English version the official language is given with a somewhat literal translation on the opposite page. There are a few maps, and in the appendix are given the two Hague conventions under which the court has been constituted.

The idea of making The Hague cases more accessible was an excellent one but it is unfortunate that the work of the editor stopped where it did. The awards are reasoned and therefore give us something that is comparable to the opinions to be found in the reports of Anglo-American courts, but in most of the cases they are not so elaborated that the arguments of counsel can well be dispensed with, and the history of the cases prior to the special agreements under which they were submitted would seem to have been essential to anything like an adequate disposition of them. There was the less excuse for these omissions in that the editor had a model in Moore's International Arbitrations.

PERCY BORDWELL.

The State University of Iowa.

**DIPLOMATIC PROTECTION OF CITIZENS ABROAD.** By Edwin M. Borchard. New York: The Banks Law Publishing Co., 1915. Pp. 1100.

This volume is the most exhaustive discussion of what is not only an important but, at present, a very timely subject. As over-emphasis of the rights of American citizens abroad may result in diplomatic rupture, if not war, and under-emphasis is reasonably sure to result in loss of prestige and self-respect, the present is a very opportune time for the publication of a sane and scholarly work on the subject. The analysis is at once clear, simple and comprehensive. The author deals first with the relation between the state and its citizens abroad, in its two-fold aspect of its right and its obligation to protect him. He next deals with the relation between the alien and the state of residence. This is discussed from

the point of view of comparative municipal law and of international law. The third division is given to a discussion of the relation between the two states concerned and this also is considered from the standpoint of mutual rights and obligations. The work is written from the standpoint of the lawyer rather than that of the theorist and hence is based upon diplomatic correspondence, treaties, and arbitral awards.

In speaking of the efficacy of force as a means of protection, he says on p. 446: "The display of force and the threat to use it, if reparation for an international offense is not promptly made, have frequently proved effective means of obtaining redress in the form of indemnity or a guarantee of security." On the following page he says: "The use of warships for such a purpose of police, perhaps the most defensible use of armed vessels, was recently illustrated in the harbor of Vera Cruz." This illustration is proper from the standpoint of illustrating the principles, but poorly selected as an example of the efficacy of such means in bringing about the desired end. It is unfortunate that the volume went to press too early to contain a discussion of interference with the rights of American citizens on the high seas in the cases of the *Lusitania* and the *Ancona* and the duty of the United States to act in such cases, also the character of action warranted by the offense. That protection of its citizens on the high seas would come within the purview of his treatise will readily appear from the basis which he suggests for such action (pp. 353-4). After stating that the right has been based by Hall upon self-preservation, by Pomeroy upon equality and by Oppenheim upon intercourse, he says: "It seems preferable to consider the state's action as a sanction for the right of international intercourse between states and individuals according to the standard of conduct and treatment recognized as proper and lawful by international law and practice."

The publication of the volume has decidedly enriched the legal literature of the interesting and important subject with which it deals.

EDWIN MAXEY.

The University of Nebraska.

**HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS.** By Roger W. Cooley, St. Paul. West Publishing Co., 1914. Pp.xii, 711.

This work contains so much that is clear, so much that is concise, and so much that is admirable, that it seems somewhat unfair to criticise defects that are an almost necessary result of brevity. Of course this work cannot be compared to the great productions on Municipal Corporations by McQuillin and Dillon. It probably was intended more for the law student than the practicing lawyer.

The whole theory of municipal law is clearly discussed, including the creation of municipal corporations and the legislative control thereof. The chapter on Municipal Contracts is a clear analysis of the underlying differences between contracts made by private

and public corporations. It is a pleasure to read the classifications of corporations and the characteristics of quasi-corporations, beginning with the historical discussions of the New England towns and the development of the municipal idea.

But when we come to the chapter on Bonds, we find this technical subject so generally treated as to be of little practical value. Such a subject as this requires minute attention and highly accurate distinctions to be of any service to the municipal bond attorney.

The same is true of the chapter on Public Improvements. Special assessments are so largely controlled by statute that the general theory of public improvements is of very little assistance in helping the special assessment attorney to determine the validity of proceedings in such a case as the recent Michigan avenue improvements, or the ordinance for the widening of Twelfth street. There is not a suggestion of *The People v. Klehm* and the *Bassett* cases, holding that a berme or inclined shoring is no part of a sidewalk and that a sidewalk ordinance containing such provisions is invalid.

It would seem that it would have been better to omit the chapter on Public Improvements entirely and to devote the space to a fuller discussion of Municipal Torts. In this latter subject, particularly, the brevity is so great that the result is occasionally almost inaccuracy. For instance, the following statement on page 406:

"The liability of municipal corporations in most cases of tort rests upon the general doctrine of the common law that the master is liable for the wrongs done by the servant when acting within the scope of his employment."

is certainly misleading. The explanation which follows does not distinguish with sufficient accuracy the private corporation rule of law in this case from the rule of municipal corporation law. On page 385, referring to the municipality's liability in the case of strictly municipal property and business, the statement that,

"It is a corporation for profit and justly subject to the same rules as a private corporation."

is certainly not incorrect, but lays too much emphasis upon the question of profit, as a factor of municipal liability, to be strictly exact. The time-honored instances of municipal liability for tort where the municipality is engaged in the performance of governmental functions, or in the conduct of business for profit, are clearly and ably set forth; but we look in vain for a case like *Johnston v. City of Chicago*, 258 Ill. 494, where the city was held liable for negligence of the driver of an auto-truck delivering books from the Public Library. This latter case really represents a very late development of this law where the municipality is held liable for negligence arising neither in the performance of a governmental function nor in the conduct of a business for profit, but merely in the operation of an enterprise of purely local concern and for the benefit of its own neighborhood or citizenry.

H. F. B.

PROCEEDINGS OF THE EIGHTH ANNUAL CONFERENCE UNDER THE AUSPICES OF THE NATIONAL TAX ASSOCIATION. Madison, Wisconsin: National Tax Association, 1915. Pp. 499.

The National Tax Association, which is composed of persons who are interested in taxation, arranges for an annual conference of delegates appointed by state governors, educational institutions, and associations of certified public accountants. At these conferences papers relating to taxation and expenditures are presented and discussed. In former years the proceedings have been limited to state and local taxation but the conference in 1914 devoted one session to the federal income tax.

The papers presented at the Eighth Annual Conference maintain the high standard established in preceding conferences. They cover all phases of the subject of taxation and emphasize in particular practical problems and recent progress in different sections of the country. While most of the papers deal with the economic or administrative features of taxation, legal questions are considered in articles on "Taxation of Express Companies" (pp. 132-146), "Taxation of Foreign Corporations with Special Reference to License Fees" (pp. 151-183), and "Analysis of Cases Relating to Situs" (pp. 242-261).

The non-legal papers are not without interest for lawyers as they show that the injustice which results from existing constitutional and statutory provisions regarding taxation is due to the failure of law making bodies to recognize certain fundamental economic principles.

The ineffectiveness of mere legislation when unaccompanied with adequate provision for administration is illustrated by many examples and the growing tendency to correct this evil is shown in the increase in the number of state tax commissions which exercise supervision and control over the local tax authorities.

The proceedings of these Annual Conferences on Taxation will be of great value to all who are interested in the equitable distribution of the burdens of taxation and the improvement of tax methods.

University of Missouri.

ISIDOR LOEB.

THE LAW OF WILLS AND THE ADMINISTRATION OF ESTATES. Enlarged Edition. By William Patterson Borland. Kansas City, Mo.; Vernon Law Book Company, 1915. Pp. xv, 723.

The scope and purpose of this little volume is thus expressed in the preface to the enlarged edition. "This volume is a revision and an enlargement of Notes on the Law of Wills and the Administration of the Estates of Deceased Persons, published by me seven years ago. That work was the publication in book form of lectures on the subject which I had delivered yearly to the senior class of the Kansas City School of Law. \* \* \* The present volume is an enlargement of that work by including all of the leading cases in this country and in England on the subject.



\* \* \* It will be found of especial value to the Western lawyer and student, as it cites every case and discusses every rule embodied in the common or statute law of the following group of states: Wisconsin, Arkansas, Nebraska, Kansas, Oklahoma, Texas, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, and California. It cites, also, every case bearing on the subject decided in the federal courts. \* \* \*

A local text book which treats in exhaustive detail and in a critical spirit the law of a particular state upon its subject, is one of the most useful types of text books which we have. But the plan of this book appears to be fatally defective. There is too great a diversity in the statutes of the thirteen Southwestern states here selected to justify their segregation in a group. The author's promise to include "all the leading cases in this country and in England on the subject" falls far short of fulfillment. His limitations of space often result in a brevity of definition that is positively misleading, *e.g.* in the definition of incorporation by reference, p. 51. It is regrettable that the author, by attempting too many things at once, has missed his chance to produce a local book of a sort of which we cannot have too many.

Urbana, Ill.

JOHN NORTON POMEROY.

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# ILLINOIS LAW REVIEW

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## LEGISLATIVE AND JUDICIAL TENDENCIES IN THE FIELD OF CRIMINAL LAW.<sup>1</sup>

BY CHESTER G. VERNIER.<sup>2</sup>

The indifference of American judges and lawyers to the output of legislative bodies is probably not so great today as it was in 1908, when a well-known writer said: "Not the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers."<sup>3</sup> Yet one may still wonder if there be many judges or lawyers who keep fully abreast of the legislative output of even their own state. The writer after an attempt to examine all the laws passed and all the cases decided in 1915, not in the whole field of American law, but in the field of criminal law only, is inclined to feel that this indifference may be due in part to the inherent difficulty of keeping up with the output.

In the year 1915 some forty-eight American legislative bodies met in special or regular session. An examination of the session laws (excluding special sessions and private laws) discloses that the legislative output varied from 270 printed pages in Wyoming,

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1. This article is based in part on a shorter article on "Criminal Law" by the same writer in the American Year Book for 1915, pp. 274-8. Figures in the notes refer in all cases to the pages of the session laws of 1915, unless otherwise indicated. Also where not otherwise indicated a violation of a statute referred to is a misdemeanor. In a few cases the penalty varies with the various sections.

2. Professor of law in the University of Illinois and associate editor of the Journal of Criminal Law and Criminology.

3. Roscoe Pound, "Common Law and Legislation," 21 Harvard Law Review, 383.

to 2,700 pages in New York. In several states the session laws exceeded 1,000 pages,<sup>4</sup> and the average for the entire number is well above 500. More than 25,000 pages were thus added to the body of American law in a single year. When one considers all the other years and the great body of law from judicial decisions, one can well appreciate the exclamation of Chief Justice Abbott<sup>5</sup>: "God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law."

While indifference may partially explain, and inherent difficulty partially justify, a lack of complete knowledge of the entire body of the law, many would doubtless like to know the general tendency in some particular field. An attempt is here made to set forth the tendencies in the field of criminal law in the year 1915, based upon an examination of more than 1,200 statutes and several hundred cases.

*Summary of Tendencies.* A reading of the criminal cases and the criminal laws enacted during the past year reveals very clearly the following general tendencies: first, a tendency to restrict the sale and use of intoxicating liquor and habit-forming drugs; second, a broadening of the scope of laws enacted for the protection of women and children; third, a tendency to denounce as fraudulent and criminal, practices which were formerly considered merely improper or immoral; fourth, a tendency to extend the laws regarding business both in scope and in detail; fifth, to give increased attention to the proper treatment of offenders, especially after conviction; sixth, to increase the protection already given to adult employees; seventh, an attempt to deal more effectively with the problem of prostitution and sex crime; eighth, a continued emphasis on laws designed to protect health, safety and morals generally; ninth, a continued effort to improve the law of procedure and to avoid technicalities.

*Intoxicating Liquors and Habit-Forming Drugs.* Congress,<sup>6</sup> for the purpose of restricting the use of narcotic drugs, has passed an act providing for the registration of producers, dealers, importers and manufacturers of such drugs, and imposing a special tax. Following the lead of Congress, the states named below have also passed

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4. Arkansas, 1546 pp.; California, 1995 pp.; Maine, 1062 pp.; Michigan, 1272 pp.; and Pennsylvania, 1190 pp.

5. *Montrion v. Jeffreys*, 2 Car. & P., 113, 116.

6. 38 Stat. at Large, 785.

laws to restrict the use of narcotic drugs: California,<sup>7</sup> Colorado,<sup>8</sup> Connecticut,<sup>9</sup> Idaho,<sup>10</sup> Illinois,<sup>11</sup> Massachusetts,<sup>12</sup> Maine,<sup>13</sup> Michigan,<sup>14</sup> Minnesota,<sup>15</sup> Missouri,<sup>16</sup> Nebraska,<sup>17</sup> Nevada,<sup>18</sup> New Hampshire,<sup>19</sup> New Jersey,<sup>20</sup> North Dakota,<sup>21</sup> South Dakota,<sup>22</sup> Utah,<sup>23</sup> Vermont<sup>24</sup> and Wyoming.<sup>25</sup> In some of the above states a violation of the statute is a felony, in others a misdemeanor or both, depending upon the particular provision violated. A Tennessee statute restricting the sale and use of narcotic drugs and forbidding physicians to dispense such drugs except where personally attending a patient, was upheld in *Hyde v. State*.<sup>26</sup> Laws relating to state-wide prohibition of intoxicating liquors have been passed as indicated below: Alaska,<sup>27</sup> submitting the question to a vote; Arkansas,<sup>28</sup> statute; Colorado,<sup>29</sup> constitutional amendment effective January 1st, 1916 and a statute<sup>30</sup> to the same effect; Idaho,<sup>31</sup> statute effective January 1st, 1916, and a joint resolution<sup>32</sup> submitting a constitutional amendment to a vote; Oregon,<sup>33</sup> statute; South Dakota,<sup>34</sup> joint resolution submitting a constitutional amendment to a vote; Vermont,<sup>35</sup> statute effective May 1st, 1916, after popular vote in the affirmative, but effective May 1st, 1927, even though majority vote be negative; and Washington,<sup>36</sup> initiative law effective January 1st, 1916. Kansas passed an interesting resolution,<sup>37</sup> which after noting that some residents of Kansas have spoken in an unfriendly way in other states of prohibition in Kansas, resolves: "That all such charges are libelous and false and do but represent the sentiment of men, who, when this state exiled the saloon, were compelled to leave Kansas for her good." North Dakota<sup>38</sup> passed a resolution urging nation-wide prohibition and<sup>39</sup> the passage of a federal law forbidding the use of the mails for advertising liquor in dry states. North Carolina<sup>40</sup> has prohibited the manufacture and sale of malt. Michigan<sup>41</sup> has made it a misdemeanor to refer to any deceased president of the United States in any advertisement of intoxicating liquor. North

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7. 1066.	14. 195.	20. 53.
8. 208.	15. 358.	21. 197.
9. 2175.	16. 279.	22. 339.
10. 148.	17. 405.	23. 74.
11. 500.	18. 119.	24. 336.
12. 167.	19. 216.	25. 128.
13. 103.		
26. 174 S. W. 1127 (Tenn.).		
27. 7.	32. 395.	37. 500.
28. 98.	33. 150.	38. 98.
29. 165.	34. 457.	39. 107.
30. 275.	35. 303.	40. 115.
31. 83.	36. 2.	41. 336.

Carolina<sup>42</sup> has passed a new regulatory act and Minnesota,<sup>43</sup> a county option law. North Dakota<sup>44</sup> has made the maximum penalty for the second offense of bootlegging five years imprisonment. Kansas<sup>45</sup> has made persistent violation of the liquor laws a felony, and denominates a second offense as "persistent." Tennessee<sup>46</sup> has further regulated the sale of liquor by druggists and<sup>47</sup> has forbidden clubs, associations, etc., to keep, sell or distribute liquor containing more than one-half per cent of alcohol. Other laws under this heading of interest follow: Alaska,<sup>48</sup> California<sup>49</sup> and Montana,<sup>50</sup> statutes regulating sales to habitual drunkards, Indians and minors; Alaska<sup>51</sup> and Nevada,<sup>52</sup> statutes making it a misdemeanor for an Indian to solicit another to purchase liquor; Louisiana<sup>53</sup> regulating shipment into dry territory; Michigan,<sup>54</sup> forbidding the sale or the furnishing of liquor at a lumber camp; South Dakota,<sup>55</sup> forbidding the sale or giving of intoxicating liquor to a person who has taken the drink cure. In *Commonwealth v. Smith*,<sup>56</sup> the Kentucky Court of Appeals held that a statute making it a crime to keep intoxicating liquor elsewhere than in the owner's private residence was unconstitutional. The writer of a note in the Harvard Law Review concludes a criticism of the case by saying: "The principal case would seem to recognize a constitutional guaranty to the individual not to be deprived of life, liberty and liquor."<sup>57</sup>

*Protection of Women and Children.* The most common statute under this head is popularly known as the "Lazy Husband Law." Although varying somewhat in detail this statute makes desertion and non-support of a wife and minor children of a named age (usually sixteen) an offense and provides that sentence may be suspended on the giving of a bond conditioned to furnish support. In Alaska,<sup>58</sup> Illinois,<sup>59</sup> Idaho,<sup>60</sup> Oklahoma,<sup>61</sup> Tennessee,<sup>62</sup> Vermont<sup>63</sup> and Wyoming<sup>64</sup> this offense is a misdemeanor; in Indiana,<sup>65</sup> Minnesota<sup>66</sup> and Oregon<sup>67</sup> it is a felony; in South Dakota<sup>68</sup> the offense is made desertion; in Hawaii<sup>69</sup> a previous act is

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42. 140.	46. 187.	50. 60.
43. 24.	47. 142.	51. 97.
44. 291.	48. 97.	52. 355.
45. 292.	49. 341.	
53. Spec. Sess. 51.		
54. 185.	55. 452.	
56. 173 S. W., 340 (Ky.).		
57. 28 Harvard Law Review, 818.		
58. 27.	62. 345.	66. 468.
59. 470.	63. 192.	67. 359.
60. 201.	64. 66.	68. 717.
61. 247.	65. 654.	69. 116.

amended to add the provision for suspended sentence; and in California<sup>70</sup> a previous act is amended to limit its operation to minor children. In Connecticut<sup>71</sup> abandonment of one spouse by the other, followed by cohabitation with another person, is a felony. Nebraska<sup>72</sup> has made it a misdemeanor for a divorced husband to refuse or neglect without good cause to pay alimony. In Tennessee<sup>73</sup> it is made a felony for a husband wilfully to leave the state after abandoning his wife with intent to leave her destitute. Similar abandonment of a child by a person legally chargeable with its care is likewise a felony in Tennessee.<sup>74</sup>

Acts for the prevention of infant blindness have been passed in California,<sup>75</sup> Illinois,<sup>76</sup> Nebraska,<sup>77</sup> New Hampshire,<sup>78</sup> North Carolina,<sup>79</sup> Oregon<sup>80</sup> and Tennessee.<sup>81</sup> In Vermont<sup>82</sup> a parent or guardian in charge of a blind child is guilty of a misdemeanor if he refuses to permit the child to receive the instruction furnished by the state for blind children, unless instruction is otherwise provided. Tennessee<sup>83</sup> has made wilful neglect of a child under sixteen by the person legally chargeable with its care a misdemeanor. Iowa,<sup>84</sup> Maine,<sup>85</sup> North Carolina,<sup>86</sup> Pennsylvania,<sup>87</sup> Utah<sup>88</sup> and Wyoming<sup>89</sup> have passed child labor laws.

The hours of labor of women in certain employments have been limited to Maine,<sup>90</sup> to nine per day; North Carolina,<sup>91</sup> to sixty per week; Oklahoma,<sup>92</sup> to nine per day; Wyoming,<sup>93</sup> to ten per day; and Arkansas,<sup>94</sup> Kansas<sup>95</sup> and Washington<sup>96</sup> have established commissions to regulate the wages or working conditions of women and children. In two noteworthy cases, *Miller v. Wilson*<sup>97</sup> and *Bosley v. McLaughlin*,<sup>98</sup> the United States Supreme Court has upheld the California eight-hour day statute for women. These cases establish the power of legislative bodies to shorten the work day of women to an extent heretofore believed unallowable by many.<sup>99</sup>

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70. 572.	77. 408.	83. 335.
71. 1930.	78. 87.	84. 206.
72. 380.	79. 345.	85. 323.
73. 347.	80. 273.	86. 232.
74. 349.	81. 139.	87. 174 and 286.
75. 143.	82. 166.	88. 68.
76. 366.		

89. 75. California (1201) and Connecticut (2004 and 2020) have passed amendatory child labor laws.

90. 367.	93. 40.	96. 243.
91. 232.	94. 781.	
92. 238.	95. 352.	

97. 236 U. S., 373.

98. 236 U. S., 385.

99. See note to these cases, collecting the authorities, in 28 Harvard Law Review, 704.

Michigan<sup>100</sup> and Oklahoma<sup>101</sup> have passed anti-cigarette laws for the protection of minors. In New York<sup>102</sup> it is a felony to give or sell narcotic drugs to a child under sixteen, and in North Carolina<sup>103</sup> it is a misdemeanor to give intoxicating liquor to an unmarried minor under seventeen. The exhibition of a hypnotized person is forbidden in South Dakota,<sup>104</sup> as is the hypnotizing of a minor without the consent of parent or guardian. Wyoming<sup>105</sup> has amended an act forbidding the harboring of children in brothels, by raising the age from eighteen to twenty-one. In Oklahoma<sup>106</sup> one who marries to escape prosecution for seduction and abandons his wife within two years without good cause may be imprisoned from two to ten years. Rhode Island<sup>107</sup> has passed an act establishing a juvenile court system. Illinois,<sup>108</sup> Michigan<sup>109</sup> and North Carolina<sup>110</sup> have passed new legislation relating to dependent and delinquent children. Vermont<sup>111</sup> requires stores, hotels, etc., employing women to provide chairs or stools for rest when not actively engaged in the discharge of their duties.

*Fraudulent and Corrupt Practices.* It is difficult if not impossible to draw a clear line between laws aimed to prohibit frauds and laws designed to regulate business. A rough division is here made, however, for the sake of convenience. Under the head of frauds the statute finding the largest following in 1915 was one prohibiting the false and fraudulent advertising of goods, services, etc., offered to the public. Such a statute was adopted in California,<sup>112</sup> Colorado,<sup>113</sup> Hawaii,<sup>114</sup> Idaho,<sup>115</sup> Illinois,<sup>116</sup> Kansas,<sup>117</sup> Minnesota,<sup>118</sup> Missouri,<sup>119</sup> Montana,<sup>120</sup> New York,<sup>121</sup> North Carolina,<sup>122</sup> and Oklahoma.<sup>123</sup> In Colorado,<sup>124</sup> Delaware,<sup>125</sup> Idaho,<sup>126</sup> and North Dakota,<sup>127</sup> the fraudulent issuance of a check without funds sufficient to meet it is made a misdemeanor. In California<sup>128</sup> the same offense is punishable by one to fourteen years in the penitentiary; in Kansas<sup>129</sup> it is a felony if the check is for \$20.00 or more; in Nebraska<sup>130</sup> punishment is a fine or one to five years in the peniten-

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100. 42.	104. 418.	108. 368.
101. 387.	105. 6.	109. 501.
102. 1017.	106. 194.	110. 294.
103. 100.	107. 12.	111. 346.
112. 1252 (goods and service); 1027 (real estate).		
113. 191.	119. 267.	125. 682.
114. 147.	120. 256.	126. 286.
115. 75.	121. 1760.	127. 59.
116. 365.	122. 291.	128. 731.
117. 4.	123. 103.	129. 115.
118. 447.	124. 196.	130. 583.



tiary; in Tennessee<sup>131</sup> it is a misdemeanor or punishable as larceny, dependent upon whether the check is under or over \$30.00; and in Washington<sup>132</sup> it is punishable as larceny.

Iowa,<sup>133</sup> Kansas<sup>134</sup> and New Jersey<sup>135</sup> have regulated bulk sales of merchandise in fraud of creditors. Alaska,<sup>136</sup> Oklahoma,<sup>137</sup> and Washington<sup>138</sup> have made it a misdemeanor to procure board and lodging with intent to defraud. In Oklahoma,<sup>139</sup> New Hampshire<sup>137</sup> and Wyoming<sup>138</sup> it is a misdemeanor to secure credit by false statements in writing. California<sup>139</sup> forbids false representations that goods are union-made and Missouri<sup>140</sup> the unauthorized use of a union label or card. Impersonating a person who is deaf, dumb, blind or otherwise physically defective for the purpose of obtaining money is made a misdemeanor in Illinois,<sup>141</sup> Indiana,<sup>142</sup> Maine,<sup>143</sup> Missouri<sup>144</sup> and Washington.<sup>145</sup> California<sup>146</sup> and Utah<sup>147</sup> have legislated to discourage the practice of selling coal under a false name. New Hampshire,<sup>148</sup> not to be outdone, has cast the mantle of protection over the victim of the lightning-rod vendor. In California<sup>149</sup> and Washington<sup>150</sup> it has been deemed advisable to discourage various fraudulent practices in connection with the initiative, the referendum and the recall by making them misdemeanors or felonies. Fraudulent procurement of relief under the mother's pension law is made a misdemeanor in Oregon<sup>151</sup> and Nevada.<sup>152</sup> A list of statutes aimed at miscellaneous frauds may be found in a note.<sup>153</sup>

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131. 527.	138. 74.	145. 236.
132. 460.	139. 816.	146. 1290.
133. 273.	140. 405.	147. 62.
134. 475.	141. 384.	148. 149.
135. 377.	142. 598.	149. 51 and 55.
136. 366.	143. 88.	
137. 49.	144. 267.	
150. 186 and 197.	151. 97.	152. 151.

153. Arkansas (843). An act to prevent public officers using public offices as political headquarters and devoting time during office hours to campaigning; Connecticut (2086)—relating to fraudulent use of warehouse receipts; Idaho (264)—relating to frauds upon livery men, and New Hampshire (51)—similar act amended to include automobile drivers who carry persons and baggage; Kansas (473)—forbidding discrimination and unfair trade in the purchase and sale of commodities in general use; Maine (5)—act to lessen frauds in the name of charity; Michigan (245)—misrepresenting in writing the identity of the issuer of a fire insurance policy, and (259)—to prevent fraud in the sale of milk and cream; Montana (256) forbidding sales of goods by street fakirs, and (118)—making fraudulent certification of a check a felony; New York (748)—selling meat falsely represented to be kosher; North Carolina (328)—fraudulent use of badge, name or ritual of fraternal societies; Oregon (147)—misrepresentation in the sale of metallic commodities; Pennsylvania (708)—unauthorized wearing of police badges; Tennessee (522)—pretended sales at auctions; Vermont (347)—false impersonation of a state, county or town officer, and

*Regulation and Protection of Business.*—Laws to prevent fraud in the issuance and sale of stocks, bonds and other securities, commonly known as "Blue Sky" laws, have been passed in Arkansas,<sup>154</sup> Iowa,<sup>155</sup> Kansas,<sup>156</sup> Michigan,<sup>157</sup> Oregon,<sup>158</sup> North Dakota,<sup>159</sup> and South Dakota.<sup>160</sup> The Iowa statute replaces the one declared unconstitutional in *W. R. Compton Co. v. Allen*.<sup>161</sup> The 1915 Arkansas statute replaces the law of 1913.<sup>162</sup> The 1913 law however, has been held constitutional in *Standard Home Co. v. Davis*.<sup>163</sup> The 1913 Blue Sky law of West Virginia has been upheld in *Bracey v. Darst*.<sup>164</sup> Several states have passed statutes regulating the sale of food products imported from foreign countries: California,<sup>165</sup> butter; California,<sup>166</sup> food and drinks containing foreign eggs; Oregon,<sup>167</sup> meat; Oregon,<sup>168</sup> eggs; Montana,<sup>169</sup> meats, lard and dairy products; and Washington,<sup>170</sup> eggs. It has been made a misdemeanor in Delaware,<sup>171</sup> Kansas,<sup>172</sup> and North Carolina,<sup>173</sup> to maliciously make and circulate false statements derogatory to the financial standing of banking institutions.

Indiana<sup>174</sup> and Oregon<sup>175</sup> have taxed and otherwise regulated the use of trading stamps. In Idaho<sup>176</sup> it is made a felony to use the name "bank," etc., without authority, or for the state bank examiner, clerks or deputies to divulge information obtained in the course of business of the department. In Massachusetts<sup>177</sup> an officer, director or employee of a trust company receiving any fee or gift other than the usual salary or fee is subject to a heavy fine. And in New Jersey<sup>178</sup> a bank agent is guilty of a misdemeanor if he asks a favor in return for issuing a loan or giving credit.

Many laws have been passed regulating business transactions

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(253)—misuse of the term "bank," etc.; Congress (38 Stat. at Large, 1186)—fixing standard barrel for dry commodities; and Washington (492)—fraudulent use of papers purporting to be judicial processes.

154. 885.	157. 63.	159. 115.
155. 151.	158. 495.	160. 657.
156. 195.		
161. 216 Fed., 537.		
162. Sess. Laws, 1913, p. 214.		
163. 217 Fed., 904.		
164. 218 Fed., 482.		
165. 689.	168. 396.	170. 274.
166. 1164.	169. 13.	171. 322.
167. 276.		
172. 114.	The Kansas statute protects other business institutions and also individuals.	
173. 345.	175. 324.	177. 200.
174. 674.	176. 194.	178. 454.

with farmers. Illinois,<sup>179</sup> Kansas,<sup>180</sup> Michigan<sup>181</sup> and Nebraska<sup>182</sup> have regulated the sale of commercial feeding stuffs; Colorado,<sup>183</sup> Kansas<sup>184</sup> and Minnesota<sup>185</sup> have regulated the business of commission merchants dealing in farm products; Minnesota<sup>186</sup> has required a statement of the ingredients of fertilizers selling for more than five dollars per ton; New Hampshire<sup>187</sup> has regulated the sale of fungicides and insecticides; Wyoming<sup>188</sup> has prohibited unfair discrimination in the purchase of farm products; and Delaware<sup>189</sup> has regulated the sale of agricultural seed.

In Delaware<sup>190</sup> it is a misdemeanor to use a facsimile of the state's great seal or coat of arms in an advertisement. New York<sup>191</sup> forbids the use of a family name in business unless it is the name of one of the persons conducting the business, or unless one is a successor in interest to a person of that name. Kansas<sup>192</sup> prohibits physicians from splitting fees with persons who send in patients, except on full disclosure to the patient; and Missouri<sup>193</sup> forbids a like practice by attorneys as well as the practice of law by associations and corporations. The Uniform Bills of Lading Act has been passed in Idaho<sup>194</sup> and Washington<sup>195</sup> and the Uniform Warehouse Receipt Act in Idaho.<sup>196</sup> These acts have the usual penalty sections. In Washington<sup>197</sup> it is made a misdemeanor to operate a "jitney-bus" without a permit. Colorado<sup>198</sup> has fixed a standard size for fruit containers and<sup>199</sup> regulated the production, purity and sale of paints and oils. Pennsylvania<sup>200</sup> has also passed a law to prevent deception in the sale of paint, putty and turpentine. Hotels and boarding houses are required to keep a register of travelers in Alaska.<sup>201</sup> In Hawaii<sup>202</sup> it is made extortion in the second degree for an agent of a public utilities corporation unlawfully to exact anything of value of patrons. Public utility corporations in Indiana<sup>203</sup> diverting funds for the purpose of concealing income or assets are subject to a heavy fine. Unlawful use of the name "Co-operative Association" is a misdemeanor in Wyoming.<sup>204</sup> General laws regulating various professions and lines of

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179. 713.	188. 16.	197. 227.
180. 476.	189. 127.	198. 485.
181. 220.	190. 687.	199. 367.
182. 398.	191. 1382.	200. 665.
183. 156.	192. 303.	201. 77.
184. 479.	193. 99.	202. 221.
185. 503.	194. 53.	203. 117.
186. 351.	195. 462.	204. 206.
187. 135.	196. 85.	

business are indicated in a note<sup>205</sup>.

*Treatment and Punishment of Offenders.*—Capital punishment has been abolished by North Dakota,<sup>206</sup> South Dakota<sup>207</sup> and Wyoming.<sup>208</sup> The North Dakota statute retains capital punishment, however, where one already under sentence for first degree murder is again convicted of first degree murder, and also provides that persons convicted of first degree murder shall not be eligible to pardon until they have spent half of their life expectancy in the penitentiary. Arkansas<sup>209</sup> has enacted that in all cases where the law fixes capital punishment the jury may return a verdict of life imprisonment in the state "penitention" (penitentiary) at hard labor. The United States Supreme Court has held in *Malloy v. South Carolina*<sup>210</sup> that the South Carolina act of 1912 substituting electrocution within the penitentiary for hanging in the county jail and increasing the number of invited witnesses is not unconstitutional when applied to crimes previously committed. Numerous statutes relating to the pay and labor of convicts have been passed. Very briefly they may be summed up as follows: California,<sup>211</sup> authorizing use of convict labor on state highways; Idaho,<sup>212</sup> providing compensation for convicts worked on state highways; Illinois,<sup>213</sup> amending act of 1911 authorizing convict labor on public roads, by omitting the clause limiting such labor to certain classes of convicts; Iowa,<sup>214</sup> providing pay and substituting the state use system for contract labor; Kansas,<sup>215</sup> forbidding the use of convict labor outside the penitentiary; Nebraska,<sup>216</sup> New York<sup>217</sup> and North Dakota,<sup>218</sup> amendatory acts relating to the employment and pay of convicts; Pennsylvania,<sup>219</sup> authorizing the use of convicts, except

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205. Architecture—Michigan (198); bond brokers—Oregon (286); chiropody—Michigan (189); chiropractic—Nebraska (409), Oregon (502); certified public accountants—Kansas (1); dentistry—California (698); Connecticut (2181); Massachusetts (380); accident and casualty insurance—Illinois (472); fire insurance—Idaho (317), Michigan (138), Minnesota (133) and (260); life insurance—Pennsylvania (885); electricians—Massachusetts (356); horseshoeing—Illinois (428); collection agencies—Idaho (187); foreign corporations—Delaware (318); medicine—New Hampshire (228); trained nursing—Colorado (432), Tennessee (108); optometry—Arkansas (457), Illinois (695), Minnesota (176), Tennessee (219); private detectives—California (1253); and warehousemen (other than grain and storage)—Minnesota (300).

206.	76.	208.	84.
207.	335.	209.	774.
210.	35 Sup. Ct.	507.	
211.	218.	213.	555.
212.	158.	214.	357.
217.	919 and 1234.	215.	76.
218.	285.	216.	301.
		219.	812.

those under sentence of death, on public highways and providing for the grant of additional good time for such work; South Dakota,<sup>220</sup> repealing the act providing for leasing of convict labor and<sup>221</sup> providing for pay.

An increase in legislation relating to probation, parole, pardon and commutation of sentence is shown by the following brief summary: Congress,<sup>222</sup> authorizing the Secretary of War to establish a parole system for prisoners confined in the United States disciplinary barracks; California,<sup>223</sup> creating an advisory pardon board; Hawaii,<sup>224</sup> commutation law and<sup>225</sup> amendatory parole law; Illinois,<sup>226</sup> amending the parole law and<sup>227</sup> the probation act; Iowa,<sup>228</sup> regulating the granting of reduction in sentences to trustees; Montana,<sup>229</sup> indeterminate sentence and parole law; Nebraska,<sup>230</sup> creating state parole officer; North Dakota,<sup>231</sup> amending the parole law; Rhode Island,<sup>232</sup> creating a state board of parole and establishing a parole system; Tennessee,<sup>233</sup> providing for suspending sentences in certain felony cases. Iowa<sup>234</sup> has passed a new sterilization law in place of the act declared void in *Davis v. Berry*.<sup>235</sup> The new act is limited to the inmates of insane hospitals and is much milder than the old law. Nebraska<sup>236</sup> has also passed a sterilization law of limited scope. Miscellaneous laws of interest under this head are collected in a note.<sup>237</sup>

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220.	294.	221.	496.	
222.	38 U. S. Stat. at Large, 1075.			
223.	465.	224.	208.	
225.	240 and 284.			
226.	376.	229.	21.	232. 28.
227.	378.	230.	376.	233. 387.
228.	358.	231.	283.	234. 238.
235.	216 Fed., 413.			
236.	554.			

237. Colorado (379)—felony to aid escape of convicts or furnish them with cocaine or other habit-forming drugs; Connecticut (2075)—felony to escape from the reformatory or to aid one in such escape; Indiana (338)—felony to escape from the state penal farm; Maine (95)—felony to break jail; California (218) and Utah (18)—felony to furnish narcotic drugs, weapons, etc., to prisoners working outside the state prison; Minnesota (344)—felony to introduce such drugs and weapons into a state prison or reformatory illegally; Kansas (350)—authorizing counties and cities to establish penal farms for misdemeanants; Nebraska (336)—creating the office of public defender in counties of more than 100,000 population; North Carolina (207)—making it a misdemeanor for a sheriff or jailor to require a person imprisoned to appear for trial in a uniform or with clipped head; Tennessee (230)—exempting children sentenced to the state reformatory from the disabilities imposed by the law relating to infamous crimes; and Vermont (350)—establishing a state office of criminal identification.

*Protection of Adult Employees.*—Congress<sup>238</sup> has passed an act to promote the welfare of American seamen in the merchant marine, making various provisions for the promotion of safety at sea and abolishing arrest and imprisonment as a penalty for desertion. Connecticut<sup>239</sup> requires manufacturing establishments to keep emergency kits for first aid in case of accident, and Illinois<sup>240</sup> requires railways to provide first aid to injured employees and passengers. Semi-monthly pay bills have been passed in California,<sup>241</sup> for employees in private employment; in Kansas,<sup>242</sup> for employees of private corporations; in Minnesota,<sup>243</sup> for employees of public service corporations; and in North Carolina<sup>244</sup> for railway employees. Wash rooms are made obligatory in Kansas,<sup>245</sup> for coal miners; in Missouri,<sup>246</sup> for coal, lead and zinc miners; and on vessels of the merchant marine.<sup>247</sup> Illinois<sup>248</sup> has passed a new act to provide for the health, safety and comfort of factory employees, repealing the act of 1910. In California<sup>249</sup> and Nevada<sup>250</sup> it is unlawful for agents of employers to demand or receive a fee or gift as a condition for employing men or permitting employment to continue; and in Washington<sup>251</sup> it is unlawful for any employment agent or other person to demand or receive fees from any person seeking work for furnishing employment or information leading thereto. Pennsylvania<sup>252</sup> has passed a general act regulating employment agencies. In California<sup>253</sup> public utility companies may not discharge or discipline an employee on the report of a "spotter" without notice and hearing, and Nevada<sup>254</sup> has a similar law for employers generally.

It is a misdemeanor in Iowa<sup>255</sup> to make false charges concerning the honesty of employees in connection with their employment and in Kansas<sup>256</sup> it is a similar offense to inform another that a person has been convicted of felony to prevent his employment or to extort money. Interference by employers with the political activities of employees is made unlawful in California<sup>257</sup> and Nevada.<sup>258</sup> Manufacturing of metals, etc., creating noxious fumes

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238.	38 U. S. Stat. at Large, 1164.		
239.	1928.	242.	203.
240.	559.	243.	57.
241.	1292.		
246.	330 and 332.		
247.	38 U. S. Stat. at Large, 1166.		
248.	418.	252.	888.
249.	61.	253.	69.
250.	68.	254.	61.
251.	1.	255.	347.
		244.	115.
		245.	310.
		256.	314.
		257.	47.
		258.	82.

must be done in rooms wholly above ground in Illinois.<sup>259</sup> Indiana<sup>260</sup> requires certain employers to grant to employees who quit or are discharged service letters showing the nature of the service performed and the true reason for the discharge or quitting. In *St. Louis & S. W. Ry. Co. v. Griffin*,<sup>261</sup> a Texas statute requiring every corporation to give a discharged employee a true statement of the reason for his dismissal within ten days after application therefor was held unconstitutional. California<sup>262</sup> has amended its minimum wage law. Colorado<sup>263</sup> has passed workmen's compensation acts, making lockouts and strikes prior to or during an investigation by a commission illegal. An Oregon act<sup>264</sup> regulates employment agencies, forbidding the splitting of fees, sending out applicants on false information, conducting agencies in saloons, etc. In Minnesota<sup>265</sup> it is made larceny for a contractor to use payments made for improvement of real estate under Section 7,020, General Statutes of 1913, other than for the advancement of the work, while labor, material-men, etc., are unpaid. The New York Court of Appeals in *People v. Klinck Packing Company*<sup>266</sup> has held the New York statute requiring manufacturing and mercantile establishments to give their employees twenty-four consecutive hours of rest in every week valid.

*Prostitution and Sex Crimes.*—As a more effective means of dealing with the evil of prostitution, the following states have passed abatement and injunction acts: Colorado,<sup>267</sup> Idaho,<sup>268</sup> Illinois,<sup>269</sup> Indiana,<sup>270</sup> Iowa<sup>271</sup> and Michigan.<sup>272</sup> In *State v. Gilbert*<sup>273</sup> the Minnesota abatement and injunction act, attacked on the ground that it did not provide for trial by jury, was declared valid. Connecticut<sup>274</sup> has made it a misdemeanor to visit a house of prostitution and Illinois<sup>275</sup> has made it a similar offense to solicit on the streets or be an inmate of a house of ill-fame. New York<sup>276</sup> has enlarged the definition of vagrancy to include various persons encouraging immoral acts. Massachusetts<sup>277</sup> has made it a misde-

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259.	431.	260.	107.
261.	171 S. W. 703 (Texas).		
262.	950.		
263.	515 and 562.		
264.	134.	265.	138.
266.	52 N. Y. L. J. 1925.		
267.	360.	269.	371.
268.	127.	270.	523.
273.	147 N. W., 953 (Minnesota).	271.	331.
274.	1930.	272.	481.
275.	374.	276.	915.
		277.	160.

meanor to permit the use of enclosed booths in cafes, restaurants and saloons, or to resort to such places for immoral solicitation or bargaining.

The importation and exportation of females for immoral purposes has been forbidden by Alaska.<sup>278</sup> In *United States v. Holte*,<sup>279</sup> defendant, a woman, was indicted for conspiring to have herself transported in interstate commerce for purposes of prostitution in violation of the White Slave Traffic act. The United States Supreme Court held the indictment good, and by an interesting *dictum* stated that a woman could be guilty of the substantive offense as well as of the conspiracy. The writer of a note in the Harvard Law Review, commenting on the case says: "That the woman is always the victim' may well be an illusion, as is suggested by Mr. Justice Holmes for the court; yet she was undoubtedly so regarded by Congress as the very name of the statute suggests; and even congressional illusions, while they should not be encouraged, should at least be respected by the judiciary."<sup>280</sup> Justices Day and Lamar dissented. In *Diggs v. the United States*<sup>281</sup> it was again held that the White Slave Traffic act is not limited to denouncing transportation of women for purposes of commercialized vice.

The following miscellaneous laws may be mentioned: Alaska,<sup>282</sup> doubling the maximum punishment for unnatural carnal crimes; California,<sup>283</sup> making the acts technically known as fellatio and cunilingus a felony; Connecticut,<sup>284</sup> doubling the maximum penalty for incest; Iowa,<sup>285</sup> attempt to produce a miscarriage made punishable by a fine and five years' imprisonment; North Dakota,<sup>286</sup> making fornication a misdemeanor; and Rhode Island,<sup>287</sup> extensively amending the law relating to offenses against morality.

*Protection of Health, Safety and Morals.*—Statutes under this head have been quite numerous, showing an increased emphasis in the movement to conserve life, health and property. Many, indeed, who would agree with the conservation idea may think that its promotion by imposing criminal penalties has been overdone. The size of sheets, their replacement and other matters relating to hotels have been regulated in California,<sup>288</sup> Indiana,<sup>289</sup>

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278. 101.

279. 236 U. S., 140.

280. 28 Harvard Law Review, 629.

281. 220 Fed., 545.

282. 50.

283. 1022.

284. 1938.

285. 329.

286. 202.

287. 107.

288. 213.

289. 300.



Nevada<sup>290</sup> and Washington.<sup>291</sup> Statutes controlling the manufacture and sale of mattresses, pillows and stuffed bedding have been passed in California,<sup>292</sup> Colorado,<sup>293</sup> Connecticut,<sup>294</sup> Illinois,<sup>295</sup> Massachusetts,<sup>296</sup> Montana<sup>297</sup> and Oregon.<sup>298</sup> Tennessee<sup>299</sup> has passed a law relating to the manufacture of clothing, cigars, etc., in sweatshops. Oregon<sup>300</sup> and Washington<sup>301</sup> have passed vital statistics laws. Oregon<sup>302</sup> also requires a report of industrial accidents. Laws relating to the manufacture and sale of foods, drinks, etc., are very numerous, as the following brief summary will disclose: Alaska,<sup>303</sup> serving used or condemned food; Delaware,<sup>304</sup> sanitation of factories where fruits and vegetables are packed and preserved; Iowa,<sup>305</sup> pure drugs; Massachusetts,<sup>306</sup> pure bread; Minnesota,<sup>307</sup> using chemical preservatives in canning fruits and vegetables; Missouri,<sup>308</sup> sidewalk display of meats, etc.; Nebraska,<sup>309</sup> sale of diseased meat; North Carolina,<sup>310</sup> artificially bleached flour; North Dakota,<sup>311</sup> pure food and drugs; Arizona,<sup>312</sup> Minnesota,<sup>313</sup> Rhode Island<sup>314</sup> and Washington,<sup>315</sup> cold storage eggs; Minnesota,<sup>316</sup> Montana,<sup>317</sup> Oregon<sup>318</sup> and South Dakota<sup>319</sup> sale of poisons by others than registered pharmacists; Michigan,<sup>320</sup> poisonous fly killers; South Dakota,<sup>321</sup> wood alcohol; Michigan,<sup>322</sup> adulterated soft drinks; New Jersey,<sup>323</sup> handling of dairy products by persons having communicable diseases. In *United States v. American Laboratories*<sup>324</sup> the Sherley amendment to the national pure food and drug law, punishing the making of false and fraudulent statements of the curative properties of medicines, was held constitutional.

The manufacture, sale and use of dangerous weapons and explosives has been regulated as indicated below: Arkansas,<sup>325</sup> possession of burglar's tools made a felony; Hawaii,<sup>326</sup> requiring report of sales of fire arms and ammunition; Illinois<sup>327</sup> and Kansas,<sup>328</sup> acts relating to the sale and manufacture of explosives; New

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290. 156.	302. 84.	314. 59.
291. 533.	303. 1.	315. 274.
292. 1267.	304. 655.	316. 82.
293. 381.	305. 346.	317. 292.
294. 1936.	306. 274.	318. 260.
295. 375.	307. 466.	319. 338.
296. 134.	308. 296.	320. 474.
297. 377.	309. 581.	321. 719.
298. 250.	310. 349.	322. 506.
299. 82.	311. 299.	323. 619.
300. 376.	312. 56.	
301. 636.	313. 21.	
324. 222 Fed., 104.		
325. 208.	326. 145.	327. 370.
328. 347.		

York,<sup>329</sup> increasing the maximum penalty for maliciously damaging, by the use of explosives, buildings or vessels where human life is endangered, from ten to twenty-five years imprisonment, and where human life is not endangered, from five to ten years; Connecticut,<sup>330</sup> restricting the sale of deadly weapons; Delaware,<sup>331</sup> forbidding the sale of deadly weapons to minors; Hawaii,<sup>332</sup> forbidding the sale of fire arms and ammunition to minors under sixteen; Massachusetts,<sup>333</sup> New Jersey<sup>334</sup> and Pennsylvania,<sup>335</sup> forbidding hunting of wild game and the possession of shot guns or rifles by aliens; Indiana,<sup>336</sup> forbidding hunting on or shooting on or across highways; North Dakota,<sup>337</sup> carrying concealed weapons; Connecticut,<sup>338</sup> assault with deadly weapon made aggravated assault; New York,<sup>339</sup> carrying of dangerous weapons changed from a felony to a misdemeanor, except where a person is over sixteen and has previously been convicted of crime. In *Commonwealth v. Karvonen*<sup>340</sup> the Massachusetts statute of 1913, forbidding the carrying of red and black flags in parades, was held valid in a case where defendant was found guilty of carrying a red flag in the parade of a socialist organization. The writer of a note in the Harvard Law Review, referring to the principal case, correctly says that a legislative enactment, no matter how freakish in nature, should not be declared void by the courts if it has any reasonable bearing upon the protection of public health, morals, safety or welfare.<sup>341</sup> Fortunately the state of Massachusetts in 1915<sup>342</sup> has seen fit to repeal this law.

The states listed below have passed statutes relating to games and sports; California,<sup>343</sup> initiative measure forbidding prize fights; Minnesota,<sup>344</sup> regulating boxing contests; Nevada<sup>345</sup> and Montana,<sup>346</sup> betting on horse races; Connecticut,<sup>347</sup> football and baseball pools; Nevada,<sup>348</sup> gambling.

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329. 1370.	331. 686.	333. 248.
330. 1922.	332. 65.	334. 662.

335. 644. The Pennsylvania statute also forbids an alien "to own or possess a dog of any kind." Pennsylvania (160) also prohibits aliens from fishing in Pennsylvania waters.

336. 111.	338. 1926.
337. 96.	339. 1288.

340. 106 N. E. 556 (Massachusetts).

341. 28 Harvard Law Review, 331.

342. 271.	345. 23.	348. 31 and 462.
343. 1930.	346. 83.	
344. 492.	347. 2024.	

Illinois<sup>349</sup> and North Dakota<sup>350</sup> have enacted legislation to prevent the abuse of maternity hospitals. The following laws have been passed to prevent the destruction of property by fire: Connecticut,<sup>351</sup> forbidding the release of fire balloons; New York,<sup>352</sup> forbidding the release of unpiloted hot air balloons adjacent to forest preserves; Pennsylvania,<sup>353</sup> forbidding the sale, purchase or giving away of balloons made to contain fire (except piloted balloons); New Jersey,<sup>354</sup> prohibiting the sale and use of paper balloons containing combustibles; Michigan,<sup>355</sup> general act to prevent fire waste; and Pennsylvania,<sup>356</sup> establishing a bureau of forest protection.

Several states have legislated to further protect the marriage relation: Illinois,<sup>357</sup> by passing the Uniform Marriage Evasion act; Kansas<sup>358</sup> and New Hampshire,<sup>359</sup> by forbidding the marriage of epileptic and insane persons where issue is possible; Oregon,<sup>360</sup> by making it illegal to advertise to procure divorces; and Vermont,<sup>361</sup> by making it illegal to marry knowing oneself to be infected with gonorrhea or syphilis. Hawaii<sup>362</sup> has regulated the operation of air-craft over Hawaiian waters or territory by persons not connected with the military or naval establishment. Some miscellaneous statutes properly placed under this heading may be found in a note.<sup>363</sup>

*Procedure, Trial, Evidence, etc.*—In order to avoid some of the difficulties encountered in the Thaw case, New York<sup>364</sup> has passed a statute providing that in any criminal action or special proceeding where soundness of mind is in issue a court may appoint to examine such person three disinterested, competent physicians who may be used as witnesses by any party to the proceed-

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349.	254.	354.	553.	359.	217.
350.	260.	355.	298.	360.	72.
351.	1974.	356.	797.	361.	338.
352.	50.	357.	496.	362.	14.
353.	260.	358.	302.		

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363. Iowa (3) and Oregon (180)—authorizing the governor to hire special agents to promote law enforcement; Connecticut (2148)—requiring users of vehicles to furnish aid and information when they injure persons or property upon public highways; Kansas (295)—regulating the driving of vehicles on public highways by persons under the influence of intoxicating liquors or drugs; Illinois (245)—contriving to have any person unlawfully adjudged feeble-minded; Indiana (111)—to prevent and control tuberculosis; Pennsylvania (1012)—loan shark act; Rhode Island (248)—forbidding boys under twelve and girls under sixteen to act as bootblacks and sellers of papers and other articles on streets and in public places; and Vermont (335)—relating to the sanitary regulation of barber shops.

364. 933.

ing. Illinois<sup>365</sup> has provided that handwriting may be proven by comparison in all courts. In Kansas<sup>366</sup> conviction of crime shall not disqualify a witness, but such conviction may be shown to affect credibility.

In *People v. Risley*<sup>367</sup> a new problem in the law of expert evidence was presented to the Court of Appeals of New York. Defendant was indicted for offering in evidence a typewritten document with knowledge of its fraudulent alteration. A mathematical expert was permitted to testify in answer to a hypothetical question, based on the assumed frequency of certain peculiarities in the altered document and in writing from defendant's instrument, that the chance of coincidence in another machine was one in four billion. This was held reversible error.<sup>368</sup> An interesting case involving the protection of the privilege against self-incrimination is found in *Burdick v. the United States*.<sup>369</sup> A witness was adjudged guilty of contempt for refusal to answer certain questions before a federal grand jury, after having refused a pardon from the president covering all offenses which he had or might have committed in connection with any matter to which he might testify. The United States Supreme Court reversed the judgment of conviction and held that the witness might refuse to accept the pardon and so preserve his right not to testify. This case certainly reaches the high water mark of protection accorded the privilege against self-incrimination.<sup>370</sup>

California<sup>371</sup> and Hawaii<sup>372</sup> have further amended their criminal codes in order to avoid technicalities in criminal procedure. An Indiana statute<sup>373</sup> enacts that participial recitals following the words "having" or "being" shall be considered allegations of fact whenever necessary to the sufficiency of criminal pleadings. In Michigan<sup>374</sup> it is provided that judgments in criminal cases may not be reversed for error unless it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. Oklahoma<sup>375</sup> has submitted to the voters a constitutional amendment making the jury in non-capital cases consist of eight men and pro-

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365. 440.                      366. 336.

367. 214 N. Y., 75.

368. See comment on the case in 28 Harvard Law Review, 693.

369. 236 U. S., 79.

370. See note severely criticising the case in 28 Harvard Law Review, 609.

371. 744.

372. 212 and 305.

373. 123.

374. 155.

375. 696.

viding that in cases less than felonies a verdict may be rendered by a three-fourths vote. Arkansas<sup>376</sup> has legislated to limit the burden of costs in criminal actions. The statute provides that the fees of no more than five witnesses shall be taxed against the county or state unless their materiality and importance are certified under oath by the attorney at whose instance such additional witnesses are subpoenaed. An interesting provision of the statute is that any attorney who has increased costs unreasonably and vexatiously shall be required to satisfy such excess of costs.

In North Carolina<sup>377</sup> contempt trials where personal conduct of a judge or his fitness to hold his position is involved, must hereafter take place before another judge. In *Drew v. Thaw*,<sup>378</sup> a prisoner who had been acquitted of homicide in New York upon the ground of insanity escaped from an asylum to which he had been committed and fled to New Hampshire, where he was arrested for extradition in compliance with a demand, based upon an indictment for conspiracy to pervert and obstruct the due administration of the laws of New York. It was held on *habeas corpus* that he was subject to extradition, despite his argument that if insane he could not be guilty of conspiracy, and if sane he was justified in escaping. In *ex parte McDonald*<sup>379</sup> we have an interesting case involving the power of a military tribunal. The governor of Montana had declared martial law in a district where rioting was prevalent. It was held on *habeas corpus* that the relator, before a military court on the charge of resisting an officer, should be remanded to await trial before a civil tribunal. This case is interesting as being opposed to the practice which was upheld in West Virginia in *State v. Brown*<sup>380</sup> and which gave rise to such a storm of deserved protest.

The most widely known case of the year was *Frank v. Mangum*.<sup>381</sup> Frank was convicted of murder by a verdict rendered during his absence from the court room, to which procedure, however, his counsel had consented. On his first motion for a new trial this was not specified as an error. A new trial was asked for on the ground of mob domination of the jury. This was denied by the trial and appellate courts. On a subsequent motion to set the

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376. 882.

377. 40.

378. 235 U. S., 432.

379. 143 Pac., 947 (Montana).

380. 71 W. Va., 519.

381. 35 Sup. Ct., 582.

verdict aside on the ground that the defendant was deprived of his constitutional rights it was held that his absence at the reception of the verdict had been waived by the failure to take timely advantage of the error, and it was again found that the jury had not been influenced by a hostile mob. Frank then petitioned the United States district court for a writ of *habeas corpus* setting forth the same allegations. The petition was denied and in the United States Supreme Court it was held, Justices Hughes and Holmes dissenting, that the denial was proper.<sup>382</sup>

*Miscellaneous Statutes and Decisions.*—In addition to the statutes and decisions already cited under the preceding nine heads, there are numerous others of considerable interest and importance. Only a few, however, will be cited under this head. In Illinois<sup>383</sup> it is made a misdemeanor to lease space in any building or place of public resort for the purpose of receiving tips, and in Iowa<sup>384</sup> it is made a similar offense to offer, solicit or accept a tip on railways, in hotels and in other public places. It is unlawful for gypsies to practice their craft in Delaware<sup>385</sup> and in Minnesota<sup>386</sup> their time for stopping at one place is strictly limited. Colorado<sup>387</sup> has made "gift enterprise businesses" unlawful, while Nevada<sup>388</sup> has repealed a similar statute. Colorado,<sup>389</sup> Iowa,<sup>390</sup> Michigan,<sup>391</sup> Montana,<sup>392</sup> and Washington<sup>393</sup> have passed absent voter acts. Several states—Illinois,<sup>394</sup> Montana,<sup>395</sup> Nebraska,<sup>396</sup> Vermont<sup>397</sup> and Washington<sup>398</sup>—have passed laws making the unpermitted use of an automobile, etc., a misdemeanor. In Colorado<sup>399</sup> the same offense is made larceny. In Idaho<sup>400</sup> failure to make proper deposit of school funds is a felony. In Idaho<sup>401</sup> and Nevada<sup>402</sup> state officials exceeding appropriations are guilty of a misdemeanor.

California<sup>403</sup> has made aliens ineligible to employment in certain parts of the public service and Nevada<sup>404</sup> has even required the regents of the state university and school trustees to dismiss alien teachers and made them ineligible for appointment to teaching positions hereafter. Connecticut,<sup>405</sup> New York<sup>406</sup> and Oregon<sup>407</sup>

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382. Frank was finally lynched after his sentence had been commuted to life imprisonment by Governor Slaton.

383. 385.	389. 221.	395. 36.
384. 347.	390. 100.	396. 582.
385. 33.	391. 475.	397. 220.
386. 398.	392. 241.	398. 459.
387. 335.	393. 691.	399. 193.
388. 7.	394. 385.	400. 272.
401. 337, 341, 360.		
402. 221.	404. 427.	406. 522.
403. 690.	405. 1980.	407. 36.

have restricted advertising on or near public highways. Idaho<sup>408</sup> has made failure to keep hides of cattle and sheep without alteration of brands for thirty days prima facie evidence of grand larceny, and in Nevada<sup>409</sup> it is a felony to have possession of cattle hides from which the ears or brands have been cut or defaced. Oregon<sup>410</sup> has regulated the transfer and recording of cattle brands and in Wyoming<sup>411</sup> failure to produce hides of cattle or a certificate of inspection on demand is a misdemeanor.

California<sup>412</sup> has repealed the act forbidding the publication of caricatures and cartoons. Minnesota<sup>413</sup> has made oral defamation a misdemeanor. In Oklahoma<sup>414</sup> the person who steals chickens at night will hereafter be guilty of grand larceny irrespective of the value of his haul. Illinois<sup>415</sup> has cleared up the doubtful situation of the dog by making him the subject of larceny. Indiana<sup>416</sup> has divided burglary into two degrees, made corrupt lobbying<sup>417</sup> a felony, and<sup>418</sup> made it a misdemeanor to destroy ballots whether cast or not cast, or destroy pencils used in an election.

Idaho<sup>419</sup> and Nevada<sup>420</sup> have forbidden nepotism in the public service. Louisiana<sup>421</sup> prohibits corporations and associations from contributing to the funds of political parties. Kansas<sup>422</sup> has restricted the use of conveyances at elections and<sup>423</sup> limited campaign expenses of candidates to ten per cent of the salary of the office for the first year. It is a misdemeanor in Iowa<sup>424</sup> to print or circulate political advertisements without showing who is responsible therefor. Massachusetts<sup>425</sup> and Montana<sup>426</sup> require adult children if able, to support worthy destitute parents. Nebraska<sup>427</sup> has forbidden embalming with preparations containing arsenic or strychnine. Oklahoma<sup>428</sup> has provided that one convicted of killing another shall not benefit by inheritance, descent, devise, legacy, insurance, etc. In *People v. Crane*<sup>429</sup> the New York Court of Appeals has upheld the New York statute requiring municipal corporations to

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408.	292.	413.	401.	418.	590.
409.	155.	414.	88.	419.	40.
410.	43.	415.	384.	420.	17.
411.	123.	416.	619.		
412.	761.	417.	5.		
421.	Spec. Sess., 44.				
422.	268.	425.	149.	428.	225.
423.	266.	426.	61.		
424.	330.	427.	404.		
429.	52 N. Y. L. J.,		2133.		

employ only citizens on public works. Tennessee<sup>480</sup> has made various offenses by night riders, *e. g.*, threats to prevent disposal of products, to compel dismissal of laborers or tenants, etc., felonies.

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430. 36.



# A REVIEW OF SOME OF THE WORLD COURT DECISIONS

W. P. ROGERS.<sup>1</sup>

We frequently hear the statement that arbitration of international disputes has failed to accomplish that which its advocates claim for it; that the Hague Court of Arbitration has so far not put an end to wars and is therefore a great disappointment; and that because human nature can not be changed, wars must forever continue. It seems worth while to glance backward again over this field, to see whether in the record of the past there is a basis for the hope of the peace advocate, or whether his vision of peace is only the imagination of an idle dreamer.

Let us begin with the admission that universal peace is neither at hand nor as nearly here as many peace advocates believe and as all desire. Let us acknowledge that international arbitration has not always, even in recent years, been adopted by contending nations as a method of terminating their controversies; and that the Hague Court has not done all that many earnest and enthusiastic men and women believed it would accomplish. Let us agree that to change human nature is a difficult task and that there are almost innumerable obstacles in the way of permanent universal peace; have we not, still, grounds for encouragement in the advances which have been made? Can the unprejudiced investigator conclude that further effort to bring about a consummation so grand and inclusive in its purpose is useless?

When we start with the fact that from the beginning of the human race, man has struggled in bitter warfare against his brother, and that the greater part of human history, both sacred and profane, is the record of tribal state and national wars, resulting so often in utter extinction of one or the other of these contending peoples, we come to a realization of the magnitude of a task which has for its purpose a reversal of these customs. It is the belief of many of our most eminent scholars and statesmen that war is not necessary to settle any dispute between nations, if only the proper spirit is exercised in dealing with the matter in controversy.

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1. Dean of The Cincinnati Law School.

Hon. Elihu Root in a public address referring to this subject said:

"There are no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement; where there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything."

Hon. John W. Foster in an exhaustive review of the subject states:

"The review which I have made has shown that all the foreign wars in which we have engaged were brought on by our own precipitate action, that they were not inevitable, and that they might have been avoided by the exercise of prudence and conciliation. It also shows that it has been possible for us to live in peace with our nearest neighbor, with which we have the most extensive and intimate relations, the most perplexing and troublesome questions. Our history also shows that during our whole life as an independent nation no country has shown toward us a spirit of aggression or a disposition to invade our territory. If such is the case, is it not time that every true patriot, every lover of his country and of its fair fame in the world, every friend of humanity, should strive to curb the spirit of aggression and military glory among our people and seek to create an earnest sentiment against all war?"

Hon. Wm. H. Taft, while President of the United States proposed that we as a nation negotiate treaties with all the other leading nations of the world binding ourselves to submit to arbitration all international questions which could not by diplomacy, be settled between the nations themselves, even though the questions involved national honor and vital interests. To this sentiment the most influential statesmen of England and other leading nations of Europe gave their approval, but the treaties were not then negotiated because of opposition by certain members of the senate to the language of the treaties proposed.

From 1899 to 1914 more than 175 arbitration treaties have been concluded between the various nations of the world. The United States has been a party to at least thirty of these treaties within that period. The following is a form of treaty representing the nature of these international contracts which have within recent years grown in popularity in the civilized world.

"If any difference shall arise between the two contracting countries which may not be settled amicably by diplomatic correspondence between the two governments they shall, by common accord, nominate an arbitrator, some third neutral and friendly power, and the results of the arbitration shall be accepted by the two parties."

The greatest forward step which the world has ever taken, looking to peaceful settlements of vital disputes is shown in the work of the two world conferences held at the Hague, one in 1899 and the other in 1907. The importance of these conferences cannot be over-estimated. Few people understand the vastness of the scope of their work, or the value of those things which have

grown out of it. There is no opportunity in so limited a space as this paper must occupy to do more than mention the progress made along the line of settling international disputes.

At the Hague Conference of 1899 there was established for the first time in the history of the world an International Court of Arbitration, the purpose of which is to settle by arbitration, disputes between nations. It seems somewhat remarkable that no question for settlement appeared before this court until October, 1903, three years after the court was established.

It is also an interesting fact that the United States was the first nation to suggest the submission to this court, for settlement of a dispute with another nation. This question arose between the United States and Mexico relative to what is known as The Pious Funds of the Californias. The Pious Fund was established in the 17th century for the support of the Jesuit Missions in Upper and Lower California. At the close of the 18th century, because of difficulty which the Jesuits had with the Pope, these funds were taken in charge by the Mexican government to be administered by the government for the benefit of the Jesuits. At the close of the war between Mexico and the United States, Upper California became a part of the United States. By the arrangements between the Jesuits and the Mexican government, six per cent. was to be paid annually by the Mexican government to the Jesuits. After the division of California it was contended by Mexico that this interest should be paid only to the Jesuits in Lower California and it refused to pay any portion to those who resided in the United States. Our government on behalf of the Catholic Church in California contended that the beneficiaries of this fund were the same as before the cession of California and that it was not material that there had been a change in the sovereignty of a portion of these beneficiaries. This dispute which involved some \$40,000,000 continued until 1868, when it was agreed to submit the question to Sir Edward Thornton, British Ambassador at Washington for arbitration. In 1869 he made an award in the matter in favor of the contention of the United States which required Mexico to pay to the United States nearly \$1,000,000 interest. This the Mexican government at once paid, but insisted that the award did not apply to future payments, and refused to pay to our government any more interest. Finally, in 1902 the two governments agreed to again submit the whole matter to the court of arbitration at the Hague. It was contended by those representing the United States that the decision made in 1869 by Sir Edward Thornton

settled the matter for all time and that the question was *res adjudicata*. But it was agreed that if the court should find otherwise it might now pass on all questions for final settlement. The court consisted of five judges, namely, M. de Martens, of Russia; Sir Edward Fry, of England; Dr. Asser, the Dutch jurist; Dr. Lohman, of the Netherlands, and Mr. Matzen, a Dane. The court decided:

1. That the case was governed by the principles of *res adjudicata* by reason of Sir Edward Thornton's decision in 1869;
2. That Mexico should pay to the United States arrears of interest amounting to \$1,420,000;
3. That Mexico should pay \$43,000 annually forever to the United States.

Mexico at once yielded to the court's decision, promptly paid the amount found to be due, and will probably in the future continue to carry out the court's decree. Here was a matter which for more than half a century had been the cause of irritation between neighboring nations and had at times drawn them into contentions so acute as to endanger their friendly relations. Nations have not infrequently appealed to arms to settle questions more trivial than this. But in a shorter period of time than is taken by ordinary courts to settle many cases between individuals, this International Court quietly adjusted this matter and by its equitable decision, removed a subject which might have drawn us into the use of force and an ugly international conflict. The decision was of the utmost importance, and yet it did not create a ripple upon the surface of business or politics, and perhaps not one citizen in ten thousand among us knew it had been made.

The next case before the court was more complicated, and involved the interests of several nations. The cause was entitled, *British Isles, Germany and Italy v. Venezuela*, and was decided February 22, 1914. Venezuela was indebted to a number of other nations and because of internal revolutions had not money to pay these debts. Germany, Italy and England had for a long time tried to secure their claims from Venezuela, but being unsuccessful they combined and with their fleets blockaded her ports and captured her war vessels. Venezuela applied to these nations to arbitrate the matters between them and it was finally agreed to leave the whole matter to the Hague Court. The creditor nations, including the United States, then intervened, as the three allied powers contended that as they had forced Venezuela into a settlement they should first be paid. There were 15 nations involved.

The questions were finally settled by Venezuela paying into a commission 30 per cent. of her income to be applied on her debts, but it was determined by the Hague Court that the allied powers should have preference in payments. This decision was much criticised but was justified by the conduct of Venezuela and by a precedent in our private courts in allowing an attaching creditor preference, over others. No one can fail to see the grave danger which presented itself here with the affairs of all these nations entangled and with our jealous watchfulness of the Monroe Doctrine. Venezuela's appeal to a court of justice, quickly dissolved the blockade of her ports and induced the battleships to depart without a shot.

The next cause to be decided by the Hague Court was that of the *British Isles, France and Germany v. Japan*. Under certain treaty rights held by England, France and Germany with Japan, citizens of these countries were permitted to erect houses on leased lands in what is known as foreign settlements in Japanese cities, but were not permitted to own the lands, the title of which the lease stated should forever remain in the government of Japan. The treaties provided for certain payments to be made by the lessees to the Japanese government in consideration for the leases and that no additional tax or burden should be imposed on such lessees, in connection with the occupancy of such lands, except those mentioned in the treaties. Many foreigners erected houses on these lands and paid the stipulated rent for the grounds thus occupied. The local government then levied taxes upon these houses and improvements and sought to collect them. The owners refused to pay. They insisted that the treaties above named exempted them from further taxation when they had paid to the government the specified rents. The personal goods of the defaulters were then seized for the payment of taxes. An appeal was made to the foreign governments for protection and the enforcement of the treaty obligations against Japan. Finally in August, 1902, it was agreed between all those nations to submit the matter in controversy to arbitration by members of the Hague Court. It was agreed that one arbitrator should be selected by Japan and that Great Britain, France and Germany should jointly select another and that these two arbitrators should select a third. Accordingly, Japan named as her representative on the court, Itchiro Motono, the Japanese minister to France. The other nations selected Mr. Lewis Renault, an eminent French diplomat and scholar. These two arbitrators selected as umpire and as the

third arbitrator, Mr. Gregers Gram, an ex-minister of state, of Norway. The court was held in the building of the Permanent Court of Arbitration at the Hague and the final decision was there rendered on May 22, 1905, by a majority vote of two to one against the contention of Japan. Motono, the Japanese representative dissented from the decision in the following language: "I wish to state my absolute disagreement with the majority of the court with regard to both the grounds and the decision of the award." The Japanese government however, regarded the decision as final and conclusive and made no further effort to enforce the house tax. The fact that the result was reached by a divided court indicates the unwisdom of selecting as arbitrator one who is a citizen of a nation involved in the dispute. But the fact that the decision even thus made, was regarded as final and was by the defeated nation strictly complied with, proves with what binding force and respect sovereignties regard the conclusions of an international court.

The next cause presented for this court's determination while apparently not of such grave importance in the subject involved was regarded of great importance by both France and Great Britain because it raised the question of their sovereign rights. The question related to the right to confer on certain native crafts of Muscat the privilege to fly the French flag. By an agreement between England and France in 1862, the two nations agreed "to engage reciprocally to respect the independence of His Highness, the Sultan of Muscat." Later, papers were issued by the French Republic to certain subjects, owners of boats and water crafts to fly thereon the French flag. England, believing these grants were in violation of her treaty with France and that the privilege thus given might tend to impair another treaty which she had negotiated with France relating to the African slave trade, objected to these subjects of the Sultan of Muscat flying the French flag, and to the conduct of the French Republic in granting these privileges. The French government insisted that it was acting within its rights in what it did. The dispute between the two nations grew so acute that it became necessary to have it determined and to have the rights of the contending nations relating to this matter more definitely fixed. It was therefore agreed on October 14, 1903, that all disputed points relating to these treaties should be submitted for arbitration to members of the Permanent Court of Arbitration at the Hague. The British government selected Chief Justice Melville W. Fuller, and the French government selected as its repre-

sentative DeSavornin Lohman of the Netherlands. These arbitrators rendered their decision in 1905. They so construed the treaties as to limit somewhat the construction placed thereon by France, and more clearly designated what persons and crews of the Sultan of Muscat should be permitted to fly the French flag. The French government submitted to this decision, and thereafter conformed to the rules announced by the court.

International statesmen and diplomats were watching these decisions and the later conduct of the nations affected by them, with intense interest and concern. There was supreme satisfaction shown when it was observed that in every case the contending nations regarded the questions thus passed upon as settled for all time. This great Court of Arbitration was proving that its method of settling international disputes was practicable as well as economical. It tended to prevent enmity and hatred between nations, such as war engenders. It left the contending parties friends, and established results which were permanent.

But up to this time those two great nations, France and Germany, who for more than forty years had realized that their arbitrament of arms had not settled matters between them, and that their deadly and expensive contest had not produced enduring results, had not appeared before this tribunal. In 1908, however, an unfortunate incident occurred which suddenly brought these two nations face to face in a matter which required immediate attention. The situation was critically dangerous and called for caution and wisdom of the highest character in its management. This was exercised by those in charge of the affair in securing its submission to the Hague Court for settlement.

The cause as it appeared before the Court was entitled *The Deserters at Casablanca*. The incident was as follows: At Casablanca, on September 25, 1908, a number of French soldiers deserted from the French Foreign Legion and were taken under the protection of the German Consulate. French officials having learned of this, seized and forcibly took them. It was insisted that the German Consul had given them improper assistance in their efforts to desert, and that this justified the French officers in forcibly retaking them. On the other hand it was contended that the French officers had committed a grave offense against Germany in forcibly taking these men, some of whom were German citizens, from the German consulate. The matter was serious. Both countries felt that in this matter a grave offense had been offered and that the nations honor was at stake. History had recorded

many wars for offenses and differences in matters of much less importance. Scare lines in the newspapers of the world announced the anxiety felt in Europe because of the attitude of these two first-class powers toward each other. But an appeal to the Hague Tribunal, instead of an appeal to arms, to investigate and settle such matters had now become more respectable and when this method was proposed it met with favor by these enlightened governments. On November 24, 1908, representatives of these nations agreed upon a submission of the controversy to the Hague Permanent Court of Arbitration. France selected two and Germany selected two arbitrators, and these four selected an eminent Swedish diplomat as the fifth member of the tribunal. They met at the Hague on May 1, 1909, and began the hearing of evidence in the matter. On the 22nd day of May the court's decision was rendered. The decision is supposed to be in favor of France, but is couched in language so diplomatic that it seems Germany accepted it without objection, and signed with France a common note which is regarded as a proper apology by each nation to the other because of the unfortunate incident between their representatives. The finding of the court and the note thereafter signed by the two governments are as follows:

"Whereas the Imperial German Government and the Government of the French Republic agreed on Nov. 10, 1908, to lay before a court of arbitration assembled for the purpose, all the questions arising out of the occurrences which took place at Casablanca on September 25, 1908, and whereas both governments undertook to express mutually their regret at the action of their officials in accordance with their decision of the question of fact and of law which should be reached by the arbitrators and whereas the court of arbitration at the Hague on May 22, 1909 announced the following:

It was a wrong and grave and manifest error for the secretary of the Imperial German Consulate at Casablanca to attempt to have embarked, on a German steamship, deserters from the French Foreign Legion who were not of German nationality. The German consul and the other officers of the consulate are not responsible in this regard, however. In signing the safe-conduct which was presented to him, the consul committed an unintentional error.

"It was wrong for the French military authorities not to respect, as far as possible, the actual protection being granted to these deserters in the name of the German consulate.

"Even leaving out of consideration the duty to respect consular protection, the circumstances did not warrant, on the part of the French soldiers, either the threat made with a revolver, or the prolongation of the shots fired at the Moroccan soldier of the consulate.

"There is no occasion for passing on the other charges contained in the contentions of the two parties.

"The Imperial German Government and the Government of the French Republic declare therefore, each in so far as it is concerned, that they express their regret for the conduct for which their officials are blamed in the award of the court of arbitration."

Thus was avoided, and for a time postponed, the inevitable recurrence of the conflict between France and Germany. No bet-



ter illustration than this can be given of the importance and value of an international court; nor can there be found a more striking instance of where two nations, standing ready to draw the sword, have more gracefully yielded to a court's decree.

By far the most important matter submitted by the United States to the Hague Court was the case of *British Isles v. the United States*, known as the *Newfoundland Fisheries Case*, which was referred to the Hague Court for settlement on January 27, 1909. This controversy relating to the rights of the United States and Great Britain in the Newfoundland fisheries had existed for more than a century and had often been the basis of ill feeling between the two nations. Since the rights of American fishermen in these waters seemed to be an unsettled matter, many petty annoyances were continually imposed upon them by both the Newfoundland and the Canadian authorities. Their settlement from time to time proved to be only temporary, so that our fishing privileges there had become, if not almost worthless, in the greatest degree unsatisfactory. The United States in 1818 entered into a convention with Great Britain relating to these Northeastern coast fisheries. Great Britain under this treaty claimed (1) the right to make regulations for American fishermen in these waters without the consent or concurrence of the United States with respect to the hours, days and seasons when fish might be taken; and (2) the methods, means and implements to be used in taking fish. This, of course, gave to England the power to discriminate against American fishermen and place them to great disadvantage in this regard. The United States denied that England had such power under the treaty of 1818. The arbitrators held that Great Britain had the power under the treaty to make regulations for fishermen without the consent or concurrence of the United States, but that they must be *bona fide*, and not discriminatory, and not so framed as to give an advantage to other fishermen over American fishermen, and that they must be fair and reasonable. They further held that if the reasonableness of any regulation is questioned it must be determined, not by one of the parties, but by an impartial tribunal selected for the purpose of determining this question. Since Great Britain had contended for the privilege both of making regulations and of passing on the question of their reasonableness it is thought that, in the main point, this question was decided favorably to the United States, although England's contention that her power to make fishing regulations without consulting any other government, was fully sustained as a right of sovereignty.

A second important question was, whether the United States had a right to employ as fishermen those who were not inhabitants of the United States. This, as may readily be seen, is a very important point, and was decided in favor of the contention of the United States the court declaring that non-inhabitants might be employed as fishermen by Americans. We may now, apparently without limitation, employ Newfoundlanders on our fishing vessels, and thus secure the advantage of their experience, and avoid the expense and inconvenience of keeping American inhabitants on fishing boats.

A third point contended for by the United States was, that her fishermen should not be subjected to "the requirement of entry or report at custom houses or the payment of light or harbor dues, or to any other such requirements or conditions." On this question the arbitrators made clear the requirements which might be imposed upon American fishermen, making what was regarded a reasonable duty to report, when it could be done conveniently by person or telegraph; but if to do so was greatly inconvenient then the American vessels need not report, "But," the decision proceeds "the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom house, nor to light, harbor or other dues, not imposed upon Newfoundland fishermen." This portion of the award sustains the position assumed by the United States.

By the treaty of 1818 American fishermen were permitted to enter the bays and harbors of the coast, not for fishing, but for shelter, or to repair damages, and to purchase fuel and water, but not for other purposes. Question four related to this matter and was intended to secure a decision fixing rights under this clause. Great Britain contended that fishermen's vessels entering such non-treaty ports should be regarded as ordinary vessels, subject to local tolls, ordinances and regulations. But the United States contended that, under the treaty of 1818, American fishing vessels entering such ports were not to be so treated, and were not subject to report at custom houses or to pay light or harbor dues as other vessels were required to do. Again, on question four, the tribunal followed the contention of the United States, and held that American fishing vessels entering such non-treaty ports are not subjected to the regulations imposed on ordinary vessels. But it held further that if such vessels remain in such ports for more than 48 hours Great Britain may require them to report to a custom house, if

reasonably convenient opportunity is offered for such report. Americans were quite satisfied with the decision of question four.

The fifth question related to the meaning of a bay as used in the treaty of 1818, and the manner in which bays are to be measured with reference to fixing the line inside of which Americans have no right to fish. Great Britain contended that in determining this point a line should be drawn from headline to headline across the mouth of a bay, no matter how wide the bay, and that three miles outside of such line should mark the limit in which Americans might take fish. This was thought to be the most important question submitted and it was decided by a divided vote in favor of England's contention.

There were other questions, less important, which were passed upon and settled by the court. The whole matter was gone over in a masterly manner, and when the decision was rendered in September, 1910, these two kindred nations felt that a cause of disturbance between them had been permanently removed in a manner which guaranteed to them a closer friendship than had ever before existed. It can not be said that either nation was thoroughly satisfied with the result in all particulars, but each recognized that it was far better to yield a portion of its claims, than to continue a controversy which had been so long pending. We have adjusted ourselves to the court's decree and from the time of this decision down to the present there has been no friction relative to the Newfoundland fisheries, and our relations with England have continued to be of the most pleasant character.

Many other international disputes have been settled by this great international tribunal and others still are pending before it. They will all, probably, be determined in the same quiet and satisfactory manner which has characterized the former work of this court, emphasizing the advantages this method presents over that adopted by warring Europe at the present time. No question involved in all these turbulent countries, concerning which they are drawing each other's life blood, is more important than many which have been decided by this great peace institution—The Hague Court. I can not contemplate its peaceful, economical and permanent work without a thrill of hope for the future. I can not contrast its methods and results with those of war without a shudder of horror at the useless carnage, waste and devastation of the latter.

As a citizen of America, I greatly rejoice that my country has been foremost among the nations of the world in advocating the

establishment of institutions which shall secure the settlement of international controversies without an appeal to force. Let us not be misled by the present conflict in Europe, into the belief that the plan of the peace advocate has been permanently set aside. But, on the other hand, we may feel assured, that when this great war terminates, there will come from all the nations of the world a common appeal for the adoption of some plan and the establishment of permanent institutions to prevent a recurrence of this suicidal carnage of nations. This movement will have back of it the united sentiment of the world. Our nation will then be in a situation which will require us to take the lead in this great problem. A great responsibility will then rest upon us, which we must be ready to meet, and which we must show ourselves capable of assuming, from a world view standpoint. Whatever terms of peace shall be finally agreed upon, the one main purpose to be emphasized, looking to the future welfare of the world, must be to make peace permanent, so far as within human endeavor this is possible. It seems apparent that this can only be accomplished by the great world powers placing under some central control all the grave problems involved in what is known as militarism, so that no one nation, either on land or sea, may acquire the power to become an uncontrollable tyrant over the other nations of the world.

# THE PRESENT STATUS OF THE ILLINOIS LAW GOVERNING MARRIAGE AFTER DIVORCE

BY HARRIS CARMAN LUTKIN.<sup>1</sup>

In 1905 the Illinois legislature passed an act prohibiting marriage after divorce under certain conditions. In view of the fact that this act has been in force for somewhat more than ten years, it seems advisable to consider the effect which this act and a subsequent enactment of the legislature have had upon the validity of marriages contracted after divorce. It is not the purpose of this article to make a critical analysis of the laws or decisions mentioned, but rather to outline this subject so that the same may be examined as a whole, leaving, for the present, the consideration of supplemental or amendatory legislation and the attempted modification of existing decisions of the courts. With this object in view the chart annexed to this article has been prepared.

The acts of legislature referred to are, **FIRST**, The act of May 13, 1905, in force July 1, 1905, as follows:

**"REMARriage WITHIN ONE YEAR FORBIDDEN.** That in every case in which a divorce has been granted for any of the several causes contained in section 1 of said act, neither party shall marry again within one year from the time the decree was granted; **PROVIDED**, when the cause for such divorce is adultery, the person decreed guilty of adultery shall not marry for a term of two years from the time the decree was granted; **PROVIDED, HOWEVER**, that nothing in this section shall prevent the persons divorced from remarrying each other; and every person marrying contrary to the provisions of this section shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years, and said marriage shall be held absolutely void."<sup>2</sup>

And, **SECOND**, the act of June 25, 1915, in force July 1, 1915, and known as the "Uniform Marriage Evasion Act," as follows:

**"SECTION 1.** Be it enacted by the People of the State of Illinois, represented in the General Assembly: That if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.

**"SEC. 2.** No marriage shall be contracted in this state by a party residing and intending to continue to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."<sup>3</sup>

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1. Of the Chicago Bar and Instructor in Law in Northwestern University.

2. Section "1-A" of Chapter 40 of Hurd's Revised Statutes.

3. Laws of Illinois, 1915, at page 496.

Section "A" of the chart<sup>4</sup> indicates the situation falling directly within the prohibition of the act of 1905 so that the marriage is invalid and the statutory penalty attaches. The same facts appear to have been raised in *Szlauszis v. Szlauszis*,<sup>5</sup> where the marriage was held to be void. A matter causing divergence of opinion and practice arose over the terms of the decree of divorce, as to whether it should use the old phraseology to the effect that the parties were free to marry again or should expressly set out the statutory prohibition against re-marriage in the prohibited period; and, whether in the latter event, a marriage contracted within the prohibited period constituted contempt of court. In *Kidd v. Kidd*,<sup>6</sup> the opinion indicates that it is not proper for the decree of divorce to contain the finding that the parties are free to marry. Furthermore, the law as laid down by the Supreme Court in the case of *People v. Prouty*,<sup>7</sup> which was subsequently decided, holds that even though the decree expressly prohibits re-marriage within the prohibited period, a person contracting such a marriage is not guilty of contempt of court for the reason that the only penalty enforceable is the one provided expressly by the statute. Since the decision in the *Prouty* case, it is improper to insert an injunction against the violation of the statute in a divorce decree.

Section "B" of the chart<sup>8</sup> represents the facts which came to the attention of the Supreme Court in the case of *Wilson v. Cook*,<sup>9</sup> and *Nehring v. Nehring*,<sup>10</sup> In the *Wilson* case it was contended that the marriage, being celebrated in a state where valid, was also valid in Illinois under the usual doctrine that a marriage valid where it is celebrated is valid everywhere. This contention was not sustained and the marriage was held to be void. The facts upon which the decision is based show that both parties were citizens of Illinois, the divorce was granted in Illinois and the marriage was within the prohibited period and was contracted by persons who went outside of Illinois for the purpose of avoiding the prohibition of the Illinois statute. Thereafter the passage of the Marriage Evasion Act, set out above, substantially enacts into statute law the decision in the *Wilson* case. Both the act in question and the *Wilson* case apply to the situation where the divorced

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4. *Post*, page 107.

5. 255 Ill. 314.

6. 164 Ill. App. 542.

7. 262 Ill. 218.

8. *Post*, page 107.

9. 256 Ill. 460, see 8 ILLINOIS LAW REVIEW 61.

10. 164 Ill. App. 527.

person resides in Illinois and intends to continue to reside in Illinois. An interesting question would arise as to the validity of the marriage where the divorced person did not reside in Illinois but intended to take up a residence in Illinois.<sup>11</sup> Even though the marriage is held to be void in this situation, the penalty provided for in the act of 1905 does not apply for the reason that under the wording of the act, the crime, if any, has been committed outside of Illinois, so that the Illinois court has no jurisdiction to punish. This illustrates the situation of a marriage void in Illinois and valid where contracted, with the complications which arise in such a situation, and which most often manifest themselves in determining dower rights and the legitimacy of children.

Section "C" of the chart<sup>12</sup> indicates a situation where the law of Illinois is not effective to prevent marriage within the prohibited period after divorce.

Section "D" of the chart<sup>13</sup> indicates the situation which falls under section 2 of the Marriage Evasion Act with the result that the marriage is void. In view of the fact that this act provides no penalty for the person marrying, none will attach unless it be under the act of 1905. It was doubtless the intention of the act of 1905 to apply only to divorces granted in Illinois. However, the wording of the statute makes it applicable to marriages after divorce even though the divorce was granted outside of Illinois, and it is well to indicate that there is force in the contention that the act of 1905 applies to this situation and that the penalty of the act may be enforced. The power of the legislature in this regard may be likened to the power to make bigamous a marriage contracted in Illinois where the husband or wife has previously contracted a marriage in another state and where the spouse of this marriage is living and undivorced.

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11. In this connection it is also well to consider the effect of the decision in the Wilson case on marriages contracted by first cousins, residents of Illinois, who go outside of Illinois and contract a marriage (valid where contracted) in order to avoid the prohibition of the Illinois statute (Hurd Chap. 81, Sec. 1), and immediately thereafter reside in Illinois. The case of *People ex rel Schutt v. Siems* (Appellate Court, First District, No. 21677, opinion filed March 15, 1916), shows these facts except that the husband was a resident of Minnesota and after the marriage in Wisconsin the wife from Illinois returned with the husband to Illinois and then went to Minnesota to reside. Under the Wilson case it was contended that the marriage was void, but the court decided that the marriage was valid, as the husband was not a citizen of Illinois. Doubtless this same result would be reached in a case of marriage after divorce where one spouse was not a citizen of Illinois and after marriage the parties resided outside of Illinois.

12. *Post*, page 107.

13. *Ibid.*

Section "E" of the chart raises the situation squarely as to whether the act of 1905 is effective where the divorce was decreed outside of Illinois, as the Marriage Evasion Act does not control on these facts. A strict construction of the language of this section indicates that the marriage is void and the penalty attaches. However, it must be noted in this connection that the act of 1905 is a prohibition of marriage after divorce granted for causes set out in section 1 of the Illinois divorce act, and as a result, where the divorce was granted outside of Illinois for a cause not provided in section 1 of this act, the marriage would unquestionably be valid in Illinois and there would be no penalty. Obviously this is an anomalous situation, and either the prohibition should extend to all marriages within a prohibited period after divorces granted outside of Illinois, or to none.

Sections "F" and "G" of the chart need no especial comment, with the exception to note that in the event that the marriage is in a state which recognizes its validity then the marriage will be valid in Illinois.

The public policy of the state of Illinois seems to be against a marriage contracted within a certain period after divorce. If this policy is to be effectively carried out the prohibition should apply to all situations indicated in the chart, and the conditions therein appearing should be remedied, so far as possible, by supplemental or amendatory legislation.

In this connection the laws of the nature of those existing in Wisconsin<sup>14</sup> and California<sup>15</sup> should be considered. These laws provide substantially that a decree of divorce does not become effective for a specified period after the decree is entered. This is an effective bar to any marriage during the prohibited period, as the relation of husband and wife is not dissolved at the time the decree is entered and any marriage contracted anywhere within the prohibited period is void, and the offending husband or wife is subject to the provisions of the law of his or her place of residence governing bigamy. Such a law in Illinois would be effective to prevent marriages under the facts of section "C" of the chart.

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14. Laws of 1913, Chap. 239.

15. Kerr's Supplement 1906-13, page 842.



## ILLINOIS LAW GOVERNING MARRIAGE AFTER DIVORCE.

1 DIVORCE IN ILLINOIS AND MARRIAGE WITHIN ONE OR TWO YEAR PROHIBITED PERIOD.	Marriage valid		Penalty in Illinois
	In Illinois	Where contracted	
A <i>In Illinois</i>	1 No	2 No	3 Yes, under Act of 1905. No contempt of Court
B <i>Outside of Illinois by party residing and intending to continue to reside in Illinois</i>	4 No	5 Yes, unless prohibited by local law	6 None (Fornication?)
C <i>Outside of Illinois by party residing and intending to continue to reside outside of Illinois</i>	7 Yes, unless prohibited by law where marriage contracted	8 Yes, unless prohibited by local law	9 None
II. DIVORCE OUTSIDE OF ILLINOIS AND MARRIAGE WITHIN PROHIBITED PERIOD			
D <i>In Illinois by party residing and intending to continue to reside where marriage prohibited</i>	10 No	11 No	12 Yes, under Act of 1905. No, under Act of 1915
E <sup>1</sup> <i>In Illinois by party residing and intending to continue to reside in Illinois.</i>	13 No	14 No	15 Yes, under Act of 1905
F <sup>2</sup> <i>Outside of Illinois by party residing and intending to continue to reside where marriage prohibited</i>	16 No	17 No	18 None
G <sup>2</sup> <i>Outside of Illinois by party residing and intending to continue to reside in Illinois.</i>	19 No	20 No	21 None

1. (Note to E.)—If divorce on other grounds than those specified under Illinois law, the marriage is valid and no penalty.

2. (Note to F and G.)—Exception where divorce in State A, marriage in State B, during period prohibited by law of State A, but where marriage valid under law of State B. In this event the marriage is valid in Illinois.

# ILLINOIS LAW REVIEW

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## EDITORIAL NOTES

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### GIVING POLITICAL ORDERS TO THE JUDICIARY.

Should a judge on the bench be at the same time an executive officer of a political party? No! In the name of an independent judiciary, we protest against the practice of having a representative of a political organization sitting in the council of judges. We hope that the last instance of that unseemly practice has been heard of in this community.

Popular elections on a partisan ticket, and partisan nomination by the party organization, have already kept the bench perilously

near to political influences. To complete the control by having a partisan official on the bench, where he can communicate party orders to the judges and can watch over their personal subservience when he communicates them, and prepare their punishment when they disobey, is to exceed the extreme limit of propriety and to undermine public confidence in the judiciary. It is a system of direct control which would be intolerable to a self-respecting judiciary, and ought to be unendurable in a self-respecting community.

We do not find that any such instance now exists in this state; and we are therefore the more free to advert to the subject without any personal reference. But there have been until recently such instances; and there may be others in the future, unless our profession registers its disapproval of the practice. Evidently its impropriety is not obvious to those who have shared in it. We call upon the Bar Associations and the public press to speak out against it.

We do not know just how far this practice has been actually used for the purpose of giving party orders to the bench. But we do know that it is plainly adapted and intended for the purpose. And it has no excuse nor reason except that very purpose. We point out that the fundamental principles of professional ethics and judicial integrity forbid it. The spectacle is repulsive. It should never again be seen in this community.

J. H. W.

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## CORRESPONDENCE

### ANOTHER VIEW OF *PEOPLE v. KIELCZEWSKI*—VERDICT UNDER REFORMATORY ACT.

TO THE EDITOR OF THE ILLINOIS LAW REVIEW:

Referring to the observations of Mr. Robert Wyness Millar on the case of *People v. Kielczewski*, 269 Ill. 293, in the April number of the REVIEW (Vol. 10, p. 668), would state that I was much interested in Mr. Millar's criticism. The views expressed were revolving in my mind during the time the case was before the Supreme Court; however, I believe the court came to the correct solution, and for this, *among other reasons*, viz.: The verdict of the jury was against the only evidence in the case as to age. Before the jurors had separated the trial judge should have had them correct their verdict in this particular. After they had separated and been discharged from further considering the case, the correction could not

be made. This rule of law is as sound and salutary as it is ancient. The judgment of the court was correct according to the verdict, and had the Supreme Court reversed the judgment with directions to the trial judge to sentence the defendant to the reformatory in accordance with the evidence, it would have been ordering the trial judge to do an inconsistent act and something the law does not permit, that is, entering a judgment that is contrary to and repugnant to the verdict returned by the jury. There must be some system and order to the records of courts and the administration of the law and trial of causes. It would be inconsistent and absurd to have a verdict invoking a sentence to the penitentiary under the law, and a judgment of the court sentencing the defendant to the reformatory contrary to the verdict and law. It was the province of the *jury* to find the facts.

Very truly yours,

THOMAS E. SWANSON.

Chicago, Ill.

[There can be no substantial dissent from what Mr. Swanson says regarding the antiquity and soundness of the rule which forbids, after the jury have separated, any such correction of the verdict as would be inconsistent with their manifest intention. But that rule has nothing to do with the present case. It requires no *correction* of a verdict to reject an immaterial portion as surplusage. The irrelevant matter is simply treated as non-existent. *Surplusagium non nocet* expresses a rule even more firmly imbedded in our legal system than that invoked by Mr. Swanson. As applied to the verdict of a jury, it was already in force in the year 1365. In a case of that year (which bears a certain curious resemblance to the one under discussion) where the question concerned an inquest of damages under a writ of ward, Finch, J., is reported as saying: "The finding that the infant was of full age before the writ brought is surplusage, and therefore the plaintiff ought to recover, which seems to be law, for the age of the infant was not any article of their charge." Brooke's Abr. Nugation, pl. 16 (39 Edw. III, 9), cited in Viner's Abr. Trial D, 9, 2. Coke says: "If the jury give a verdict of the whole issue, and of more, &c., that which is more is surplusage, and shall not stay judgment." Co. Litt. 227 a. The principle is constantly being acted upon by both trial and appellate courts. See, for example, *Armstrong v. People*, 37 Ill. 459; *People v. Coleman*, 251 Ill. 497; *Statler v. United States*, 157 U. S. 277.

*Sullivan v. People*, 159 Ill. 94, holds that a finding of the

present description is only rendered necessary by the introduction of proof tending to show the defendant's minority. *Ex hypothesi*, the record in *People v. Kielczewski* disclosed no such proof. Hence the finding was unnecessary. It was precisely analogous to a finding which goes beyond the issues. True, the finding "was against the only evidence in the case as to age," but, if any importance is to be attached to this fact, it can only be on the quite impossible theory that a conflict between an unnecessary finding and an equally unnecessary piece of evidence renders that unnecessary finding necessary. The only effect of the testimony was to establish affirmatively that which before had rested in presumption, namely, the fact of the defendant's majority. It is the undisputed existence of this fact which, in the ultimate analysis, renders the finding unnecessary. *Porter v. People*, 158 Ill. 370; *Doss v. People*, 158 Ill. 660; *Herder v. People*, 209 Ill. 50. That "it was the province of the jury to find the facts" may be readily admitted, but that province included only the finding of such facts as the law authorized them to find; they were restrained to that which was "article of their charge." "The jurors are not to meddle with any matter which is not in issue; and if they do, it is but a matter of surplusage and to no purpose." *Pepy's Case* (1583), 3 Leon. 80.

If, therefore, the objectionable portion of the verdict in question was surplusage, the propriety of remanding with directions to re-sentence admits of no question. *Henderson v. People*, 165 Ill., 607; *Neathery v. People*, 227 Ill., 110; *People v. Coleman*, 251 Ill., 497, *supra*; *People v. Smith*, 253 Ill., 283. Omitting the supererogatory finding, the record, in the language of *People v. Coleman*, *supra*, "shows a good verdict, and one upon which a valid judgment of conviction may be based."

R. W. M.]

## COMMENT ON RECENT CASES.

**JUDGMENTS—EXECUTION AGAINST THE PERSON AFTER RETURN OF PROPERTY EXECUTION UNSATISFIED.**—May a creditor in a tort judgment have in succession execution against the property and execution against the person, without other prerequisite to the body execution than the return of the preceding writ unsatisfied? In *Field v. Freed*, 269 Ill., 558, the Supreme Court holds that he may. Accord, see *Kitterman v. People*, 181 Ill. App. 682; *Nelson v. Swanson*, 186 Ill. App., 632; *Chapman v. Barisey*, 21 Fed., 903.

The solution of the question depends upon the proper construction of sections 4, 5 and 62 of the statute on Judgments, Decrees and Executions in Hurd's Revised Statutes (1913 edition) p. 1493. Section 4 of this statute provides that the creditor may have execution against the lands and tenements, goods and chattels of the defendant "or against his body, when the same is authorized by law." Section 5 provides that no execution shall issue against the body except when the judgment is "for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad respondendum* as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors." Section 62 provides for the issuance of a *capias ad satisfaciendum* on any judgment (entered on the verdict of a jury or against the defendant, after his formal written waiver of jury trial, see Hurd's Revised Statutes, 1913 edition, p. 1882) where, upon the return of execution unsatisfied, the judgment creditor, or his agent or attorney, shall make an affidavit showing that demand has been made on the debtor for the surrender of estate to satisfy the execution, and that the debtor has estate which he unjustly refuses to surrender, or has conveyed or concealed his estate to defraud his creditors.

Interpreting these provisions, the then "Branch D" Appellate Court of this district, held in the case reviewed (191 Ill. App. 619) that the word "or" used in section 4 above set forth imports an alternative that the creditor may have either execution against property or execution against the person in the first instance in a tort case, but that he cannot have both; and that having once taken out execution against the debtor's property, the only means through which the creditor can subsequently obtain execution against the person is by complying with section 62, that is, by making application upon return of the property execution unsatisfied, supported by affidavit showing refusal to surrender, or fraudulent conveyance, or concealment of property. The position of the Appellate Court would be stronger if the alternative worked both ways, but it had been held by the Supreme Court under the present statute (*Lambert v. Wiltshire*, 144 Ill., 517) as well as under a previous one (*Strode v. Broadwell*, 36 Ill., 419) that the issuance of *capias ad satisfaciendum* and seizure of the defendant thereunder who

was afterward released, did not prevent the subsequent issuance of and proceeding under a *feri facias*. Expressly recognizing this holding of the Supreme Court in the *Lambert* case, which it points out is in accordance with the express provisions of the statutes, the Appellate Court bases its decision in the case before it upon the ground that the statute permitting the issuance of executions against the body is penal in its nature, and is therefore to be strictly construed, and that by its express terms, section 62 applies in all cases in which an execution has been issued and returned unsatisfied in whole or in part. In other words, it would seem to be the holding of the Appellate Court, that because the statute expressly provides the circumstances under which the clerk may issue *capias ad satisfaciendum* after return of *feri facias* unsatisfied, this express provision is exclusive of all other circumstances under which the writ may issue at this stage of the proceedings.

To say that a statute which does not create a remedy, but merely permits or limits the use of one theretofore existing, is penal in its nature, would seem a misuse of terms. Nonetheless, if tested by an inspection of the statute alone, the ultimate decision and in the main, the reasoning of the Appellate Court seems sound. Therefore, a pertinent inquiry is: What light is thrown upon the subject by the history of this portion of the law?

The feudal system, being inconsistent with the imprisonment of one owing service to his lord, did not permit of imprisonment in civil suits, except for the king's debt or in actions *vi et armis*, and in case of contempt, and the later system of imprisonment in execution resulted from a series of statutes which, commencing with a provision in the statute of Marlbridge for attachment of bailiffs in actions of account, by subsequent enactments extended the remedy so that finally it was applicable to substantially all actions at law. Statute of Marlbridge, 52 Henry III., Chap. 23; statute Westminster Second, 13 Edward I. c. 11; statute, 25 Edward III. C. 17, (erroneously cited in Mr. Freeman's excellent treatise on Executions, (3d.,) Vol. III, p. 2393, as 13 Edward III.) and statute, 19 Henry VII. c. 9; *Sir William Harbert's Case*, 3 Coke B; Hale's Treatise on the Courts of King's Bench and Common Pleas, contained in Hargrave's Law Tracts, Volume 1; Freeman on Executions (3d ed.) Vol. III, pp. 2391, *et seq.* Without strict accuracy in language, it was said that none of these statutes gave *capias* other than in *mesne* process,<sup>1</sup> but that because of the

1. The statute of Westminster Second clearly provided both for imprisonment after the auditors appointed by the master should have found the servant, bailiff, chamberlain, or other manner of receiver in arrearages, and that after hearing before the Barons of Exchequer or the auditors assigned by them, "if he be found in arrearages, he shall be committed to the Fleet as above is said," that is, that the persons of the class aforesaid found in arrearages should be imprisoned in Iron under safe Custody, and shall remain in the same Prison at their own Cost, until they have satisfied their Master fully of the Arrearages." See 2 Coke's Inst., 379.

provision for *capias* in *mesne* process, a *capias* in consequence lies on the judgment, but at any rate the principle was generally accepted as a rule of common law that wherever a *capias* lies in process before judgment, it will lie in execution upon the judgment itself. 3 Salk, 286; Tidd's Practice, p. 1025. Execution against the person continued as an ordinary process in civil suits in England until the Debtor's Act of 1869, 32 and 33 Victoria, Chapter 62. This enactment abolished imprisonment in execution in all civil actions, both tort and contract, with the exceptions of the cases of default, in payment of a penalty, or of any sum recoverable summarily before a justice of the peace, or of a trustee or fiduciary to pay over money on order of a court of equity, or of an attorney to pay costs when ordered for misconduct, or a sum of money when ordered in his official character, or of default in payment of salary or income under order of bankruptcy court; but authorizes commitment by the court for a limited period to compel the satisfaction by the debtor, of sufficient means but recalcitrant disposition, of any judgment or order for the payment of money. It also made it a misdemeanor to obtain credit by false pretenses or fraud, or to convey, or in some cases conceal property, with intent to defraud creditors. Obviously, there is no similarity between the English statute law and ours, and if there is anything to be derived from the English law pertinent to the construction of our statute, it must be found in three principles deducible from the English decisions and practice; first, that wherever *capias* lies in process before judgment, it will lie upon the judgment itself; second, that subsequent modifications and restrictions of the system of imprisonment on *mesne* process do not abolish or alter imprisonment in execution, nor does the failure to issue *capias ad respondendum* prevent the issuance of *capias ad satisfaciendum* in a proper case; and third, that a partial satisfaction by *fiery facias* returned in due course is not a bar to the subsequent issuance of a *capias ad satisfaciendum*.

The first constitution of the state of Illinois contained the identical provision embodied in each of the two succeeding that "no person shall be imprisoned for debt, undess upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases where there is a strong presumption of fraud." Constitution of 1818, Section 15, Article VIII; Constitution of 1848, Section 15, Article XIII; Constitution of 1870, Section 12, Article II. Yet the earliest statutes recognized *capias ad respondendum* as the initial process as of course in many cases, and to be granted by the court in other cases where found proper upon affidavit whose requirements were not specified (see Practice Act, Laws of 1819, second session, page 139), and it was not until the second legislature following the adoption of the constitutional provision (1821) that appearance bail as a matter of course was abolished.<sup>2</sup> The statute then enacted provided for appearance bail to be required where the plaintiff



should make affidavit that there was danger of losing his demand unless the defendant be held to bail, but as subsequently construed by the Supreme Court, in the light of the constitutional provision, it was necessary to show fraud in other than tort actions. *In the matter of Jesse N. Smith*, 16 Ill., 347; *Stafford v. Low*, 20 Ill., 152. Thus the law continued until 1872, when the statute now in force was enacted, by which the provisions theretofore existing for imprisonment on mesne process (R. S. 1845, Ch. 14, Section 2, pp. 80, 81), changed only (1) by specifying the requirement that in cases of a contractual nature the affidavit must show that the debt was contracted or the obligation incurred by fraud or that the defendant has concealed or disposed of his property to defraud the plaintiff; (2) by omitting to require the showing of danger of loss, in such cases; and (3) by substituting the satisfaction of a judge or master in chancery that sufficient cause is shown to require bail for the action of the clerk of the court subject to review by the court at the return term. No change is made in the grounds for *capias ad respondendum* in tort actions. Hurd's Revised Statutes, 1913 ed., p.—.

The earliest statutes recognized *capias ad satisfaciendum* as a matter of course, providing for the discharge under the insolvency act of any person in prison under final process. Insolvent Debtors' Act, Laws of 1819, Second Session, pages 301-305. A new statute enacted in 1821 for the relief of insolvent debtors did not apparently permit of the discharge of a defendant imprisoned under a tort judgment. The same year (1821) the legislature especially provided for execution to be issued by justices of the peace against the property of the defendant or in default thereof against his person (Laws of 1820-21, page 135), and it seems to have been the usual practice in courts of record to issue execution against the body of the defendant, where execution against the property did not result in satisfaction. See also Laws of 1819, Second Session, pp. 189, 178.

In 1823 it was provided that no person should thereafter be imprisoned for debt except where execution should be returned no property found, and the plaintiff or his agent or attorney should make oath to a belief that the defendant intends to remove or abscond out of the county of judgment or defendant's residence, or unless the plaintiff or his agent or attorney should make affidavit, the truth of which should be ascertained by jury, tending to show that the defendant had concealed or transferred property to defraud the plaintiff. Laws of 1823, page 158. And in 1825, in section 5 of the act concerning judgments and executions, it was provided that the party obtaining judgment might have execution against the body of the debtor, or against his property, or both in succession, but only as provided in the Act of 1823 above mentioned, but that nothing in that act or in the Act of 1823 should restrain or prevent any execution being issued against the body of the defendant where the judgment was for tort or trespass. In

1829, the statute of 1823 was repealed by the Insolvent Debtors' statute (R. S. 1833, page 351), which, in section 1, provided for execution against the person only in case of the refusal of the debtor to surrender his estate for the satisfaction of any execution against his property; but section 1 of the chapter on judgments and executions of 1825 was not referred to, and the practice of issuing execution against the person in tort cases seemed unchanged. Section 1 of the Insolvent Debtor's Act of 1845 (R. S. 1845, page 282), was substantially the same as section 1 of the Insolvent Debtor's Act of 1829, and in section 5 of the chapter on judgments and executions, of 1845, it was provided that the judgment creditor might have execution against the property of the defendant "or upon his body when the same is authorized by law, provided that no execution shall issue against the body of the debtor except as is provided in chapter fifty-two of the Revised Statutes," *i. e.*, as provided in the insolvent debtor act aforesaid. In the succeeding section, it was provided similarly, as in the Act of 1825, that "nothing herein contained shall restrain or prevent any execution from being issued against the body of any defendant, where the judgment shall have been obtained for a tort or trespass committed by such defendant." R. S. 1845, p. 301. These statutes of 1845 were the laws in force at the time of the enactment of the present provisions.

The effect of the restrictions on the issuance of execution against the body in force up to 1872, and especially from 1829 to 1872, would seem to be that in some cases where a defendant might be arrested and held to bail, as in the case of the debt contracted by fraud, where there was danger of losing plaintiff's demand unless defendant were held to bail, he could not be held in execution because the grounds for *capias ad satisfaciendum* did not exist. The present statute cures this defect by expressly excepting from the prohibition against the body execution the case where the defendant has been held to bail on *capias ad respondendum*, thus leaving room for the principle that where *capias* lies as *mesne* process it lies as execution. So far as issuance of execution is concerned, this would seem to be the only substantial departure from the provisions of 1845. The provisions of section 4 of the present statute on Judgments and Executions is substantially the same as that of section 5 of the act of 1845, except for the proviso against execution other than in case the defendant has refused to surrender property, which being omitted, the provision in the succeeding section against restricting executions on tort judgments, which is also omitted in the present statute, is unnecessary. The purpose of both said proviso and the provision in the succeeding sections are covered by section 5, *supra*, which prohibits execution against the body except in case of tort where it has always issued, in case of *capias ad respondendum* where it would issue unless restricted, and in case of refusal to surrender property where the statute expressly provides for its issuance. Section 62 includes not only the case of refusal of defendant to surrender his estate as in the Insolvent Debtors Act of

1845, but also, what would be ground for *capias ad respondendum* if it existed before suit, the fraudulent concealment or disposal of property which was one of the grounds for *capias ad satisfaciendum* under the statute of 1829, but the Supreme Court treats this properly it would seem, as within the meaning of the third class of section 5, the cases of refusal to surrender property.

It is clear that under each of the statutes existing prior to the present one, execution against the body would lie in a tort action after the return of a property execution unsatisfied and irrespective of proof of the concealment of or refusal to surrender property. Also it seems clear that the legislature of 1872 intended not to restrict but, on the contrary, to enlarge the scope of imprisonment on execution as theretofore, and that they could not have intended to restrict its application in tort cases is further indicated by their adoption of an insolvent debtor statute which permits relief in the case of tort judgments where malice is not of the gist of the action as well as in cases of imprisonment for debt to which cases alone unconsciously influenced by the English law and the practice under the preceding legislation in Illinois. Viewed in the light of these, the prior insolvent debtor statute was limited. *People v. Cotton*, 14 Ill. 414.

It would seem then that the decision of the Appellate Court must have been based upon a consideration of the language of the statute alone without reference to its history, and that when Mr. Justice Farmer, speaking for the Supreme Court, before referring to the previous legislation, states that the construction adopted by the Superior Court seems free from difficulty, he must have been the ultimate decision seems thoroughly sound.

C. B. E.

**PRACTICE—STATEMENT OF CLAIM IN THE MUNICIPAL COURT.—** However open to criticism the result in *Gillman v. Chicago Railways Co.*, 268 Ill. 305, we had supposed that it settled the rule that, in a tort case, the statement of claim, under the provisions of section 40 of the Municipal Court Act, must contain all the substantial elements of a common law declaration, or, in other words, that it must state a cause of action. Now comes *Enberg v. City of Chicago*, 271 Ill. 404, and no man can say, with any degree of confidence, what the rule really is. This case decides that in an action against the city, for the negligence of its servants, an amendment to the statement of claim, filed after the expiration of one year from the date of injury, alleging, for the first time, the giving of the statutory notice to the city is not answered by a plea of the statute of limitations. The court concedes that if this had been a case of amendment to a common law declaration, the holding, under *Walters v. City of Ottawa*, 240 Ill. 259, must have been otherwise. But, to the contention that the *Gillman* case puts the statement of claim in a tort case on a parity with common law declaration in the present respect, it answers that the latter case "does not hold that an

ultimate fact in no way connected with the tort or the commission thereof must be averred or stated in a statement of claim."

The curious thing is that the opinion does not altogether reject the idea that the statement of claim is required to disclose a cause of action. "It is not true," says the court, "that the amended statement of claim states a new or different cause of action within the meaning and requirements of said section 40. \* \* \* The amendment was a mere statement of a fact that happened after the cause of action accrued, in no way descriptive or explanatory of such cause of action, and we hold that both the amended and the original statement of claim, within the meaning of said section, state precisely the same cause of action and gives precisely the same information as to the cause of action for which suit is brought."

But the difficulty here is that the *Walters* case proceeds directly on the theory that the averment of notice is an integral part of the statement of a cause of action. "The giving of the notices required by statute," it was said, "has been made a condition precedent to the city's liability and constitutes an essential element of the plaintiff's cause of action." Concerning the correctness of this view, there cannot be the slightest doubt. "'Cause of action,'" to quote the observation of Brett, J, in *Cook v. Gill* (1873) 8 L. R. C. P. 107, 116, "has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse." And in barring the plaintiff for failure to state his cause of action until after the statute had run, the *Walters* case is, therefore, unimpeachable. Unimpeachable, that is to say, under the perverted doctrine of comparatively recent introduction in this and other American jurisdictions, which prefers to look at the technical cause of action rather than considerations of substantial justice in determining the question of amendment after the statute has run. For the common law took a very different view. *Bearecroft v. Hundreds of Burnham and Stone* (1694) 2 Lev. 347; *The Schooner Harmony* (1812) 1 Gall. 123.

It is hard to understand why the construction of section 40 should have proved so troublesome. According to its terms, the statement of claim, "if the suit be upon a contract, express or implied, shall consist of a statement of the account or of the nature of the demand, or if the suit be for a tort, it shall consist of a brief statement of the nature of the tort and such further information as will reasonably inform the defendant of the nature of the case he is called upon to defend." Then there follow the words: "but nothing herein contained shall be construed to require the statement of claim in any action for a tort to set forth the cause of action with the particularity required in a declaration at common law." *Edgerton v. Chicago, Rock Island & Pacific Ry. Co.*, 240 Ill. 311, was the first case in the Supreme Court wherein the status of the document thus provided for came into question. It seems to have considered the statement of claim not to be a pleading at all and held that the rule as to joinder of parties obtaining in

contract actions would not be applied where the evidence showed a cause of action in tort, notwithstanding that the statement of claim was in the form appropriate to a contract action, because "as to this [fourth] class of cases under the Municipal Court Act, the same rule will govern as controls the form of actions before justices of the peace." The same attitude was preserved and the language just given quoted with approval, in *Schultz v. Ericsson Co.*, 264 Ill. 156, where it was decided that in an action for injuries due to a wilful violation of certain provisions of the Employment Act the statement of claim need not contain any reference to the statute. Under these cases, there seemed little doubt that all that section 40 required was reasonable notice of the plaintiff's demand. But, with the *Gillman* case (decided by a vote of four to three) all this was changed. The plaintiff here had alleged that his "claim was for damages caused by a door in one of defendant's street cars violently striking the car bumper and breaking the glass in the door and showering broken glass on plaintiff, cutting the blood vessel and nerve in the back of plaintiff's right hand, causing pain and suffering and loss of two week's time and permanently injuring plaintiff's hand, to plaintiff's damage of \$1,000"—and the question was whether such a statement, which obviously did not set forth the essentials of a technical cause of action, would support a finding and judgment for the plaintiff. Regarding the statutory requirement of "a brief statement of the nature of the tort," the court said: "It is difficult to conceive how it is possible to show a tort without disclosing a cause of action. \* \* \* To state the nature of the tort. \* \* \* it is essential to show a violation of a legal duty by the defendant." The proviso that "nothing herein contained shall be construed to require the statement of claim in any action for a tort to set forth the cause of action with the particularity required in a declaration at common law," in the view of the court, reinforces this result. "This proviso," it was said, "proceeds on the theory that the statement of claim must show a cause of action \* \* \* those words carry the implication that the cause of action must be set forth but not with that degree of particularity" required in a common law declaration.

The case against this manner of construction is very strongly stated in the dissenting opinion of Mr. Justice Craig (with whom concurred Farmer, C. J., and Carter, J.). By collating various provisions of the act, he conclusively demonstrates that the majority result is in sharp conflict with the intent of the legislature, everywhere manifested, to establish a procedure whereby "the parties could submit a case and have it decided on its merits." He points out that "to adopt the construction put upon the Municipal Court act by the foregoing opinion would be to render void many of its provisions, as it was never required, even at common law, that the plaintiff should do more than set forth a good cause of action in his declaration."

In addition to what is said by Mr. Justice Craig, it is to be observed, that, as an isolated proposition, it is perhaps true that

there can be no "statement of the nature of a tort," without disclosing a cause of action, since until we know that a cause of action exists we have no right to speak of a "tort." But here we are not dealing with an isolated proposition. We must read the words "brief statement of the nature of the tort" in connection with what immediately follows, viz., "and such further information as will reasonably inform the defendant of the nature of the case he is called upon to defend." So read, the words assume a different complexion. Clearly all that is called for is adequate notice; this is emphasized to the point of tautology: there is to be given such "information as will reasonably inform." Of this faulty phrasing, the proviso is merely a reflection. The draftsman plainly did not wield the most pointed pen in the world. When he said that the preceding provision was not to be understood as requiring the statement of claim "to set forth the cause of action with the particularity required in a declaration," he was merely employing an elliptical form of expression current in conversational usage. What he obviously meant to say was that the statement need not "set forth the cause of action as required in a declaration at common law or allege the nature of the tort with the particularity therein required." The court suggests that "if by the preceding part of the section it was not required to state a cause of action, it was unnecessary to say that the cause of action need not be stated with the particularity required at common law." On the other hand, if by the preceding part it was intended to require the setting forth of a cause of action, why did the draftsman fail to say so, in so many words? The proviso, as the court remarks, may in this view be useless. Even so, it is by no means the first useless provision which has owed its birth to a superabundant caution.

If anything further were needed to condemn the *Gillman* decision, we need only look at its necessary consequences. To say nothing of the fact that it subjects to the incidents of technical procedure a multitude of cases which were disposed of before the passage of the act without any pleadings at all, it creates one rule for tort cases and another for at least a large class of contract cases. The proviso, it should be noted, is restricted to cases of tort. So far as contract actions are concerned, the only provision is that the statement of claim "shall consist of a statement of the account or of the nature of the demand." Can the "nature of the demand" be shown without disclosing a cause of action? One would ordinarily think so, but, as it seems to the court impossible to show the nature of a tort without disclosing a cause of action, perhaps it is equally impossible to show the nature of a contract demand. However that may be, it is indubitable that a "statement of account" does not imply the stating of a cause of action. So that in tort cases, the statement must show a cause of action; in contract cases other than those involving an account, we cannot say whether a cause of action must be shown or not; and in cases where the demand is upon an account, we are quite sure that no cause of action need be shown.

To the discouraging state of affairs just indicated, the *Enberg* case adds its confusing contribution. It informs us in effect that while, in a tort case, the cause of action must be stated, yet there is at least one accepted element of a cause of action which the statement of claim may safely omit and still state a cause of action "within the meaning of section 40." Wherein all we can see is a verbal compromise. Either a cause of action is to be stated or it is not. The attempt to create a middle ground by speaking of "a cause of action within the meaning and requirements of section 40" accomplishes nothing: a "cause of action within the meaning and requirements of section 40" will never be aught but the creature of the moment's need.

In the present case, decided, like the *Gillman* case, by a vote of four to three, the opinion was written by Mr. Justice Duncan. The dissent is by Dunn, Cooke and Cartwright, J. J., who, with the late Mr. Justice Vickers, constituted the majority in the earlier decision. Since the balance of power had thus apparently passed to those members of the court who favored a liberal construction of section 40, it is cause for regret that they did not boldly face the fact that the *Gillman* case was decided on a mistaken view of the law and seize the opportunity of giving to that section the effect it was intended to have. The bar has plenty of demands on its time and energy without being burdened with the hopeless task of differentiating between a "cause of action" and a "cause of action within the meaning and requirements of section 40."

R. W. M.

MORTGAGES—ABSOLUTE DEED WITH SEPARATE AGREEMENT TO RECONVEY—NATURE OF MORTGAGOR'S INTEREST.—In *Williams v. Williams*, 110 N. E. R. 876, 270 Ill. 552, the Supreme Court of Illinois held that where a mortgage of land was created by a deed absolute on its face with a contemporaneous bond by the mortgagee to reconvey on payment of the debt, the mortgagor's interest was essentially different in its nature from his interest under an ordinary mortgage. Under the ordinary mortgage, the mortgagor is, in this state, deemed the legal owner as against all persons except the mortgagee. His interest is, therefore, conveyable in the same manner as unincumbered land, and the formalities requisite in conveyances of unincumbered land, are also required for the conveyance of the equity of redemption. But where the mortgage is created by a deed absolute on its face and a separate agreement for reconveyance or defeasance, the court holds the mortgagee's interest to be an equitable interest purely, and that it may, therefore, be conveyed or assigned without the formalities requisite for the conveyance of a legal estate or interest. It was accordingly held, in the principal case, that a voluntary conveyance not under seal of the mortgagor's interest under such a mortgage was valid and effectual, though in the case of the ordinary mortgage a seal would be necessary.

In reaching the foregoing conclusions, the court relies largely on

the case of *West v. Reed*, 55 Ill. 242, holding that under a mortgage by absolute deed with separate bond for defeasance, the equity of redemption could be extinguished by subsequent parol arrangement between mortgagee and mortgagor without any formal conveyance by the latter, the court saying that the mortgagor's interest is "a purely equitable estate."

It seems unfortunate to make a distinction with respect to the nature of the mortgagor's interest between mortgages in ordinary form and mortgages by absolute with deed separate agreements for defeasance. If the two instruments are contemporaneous they should, on familiar principles, be taken together as constituting one entire transaction, and hence it should be immaterial whether the conveyance and defeasance are in one or in two instruments.

The difficulty seems to arise from the doctrine, generally accepted in jurisdictions where the mortgage is not regarded as a mere lien, that the mortgagor is the owner of the legal estate as against all the world except the mortgagee. This doctrine appears to be illogical, since the legal title cannot, in the nature of things, be in two different persons (not concurrent owners) at the same time. It grows out of the failure of courts to distinguish clearly between the legal and the equitable views of the title mortgage. The objection to this doctrine as applied to a mortgage by absolute deed and separate defeasance are perhaps more striking than when applied to the ordinary mortgage. Hence the readiness of the court to create a separate category for mortgages of the former kind. The preferable doctrine would seem to be to give to the mortgage its full effect *at law* according to its tenor, and to consider the additional rights of the mortgagor as equitable rights. If, however, the mortgagor is to be deemed the legal owner except as against the mortgagee, it would seem that that view should be consistently maintained as to mortgages of all kinds.

The court seems clearly correct in holding that an equitable interest in land may be conveyed or assigned by writing not under seal. Maitland's *Equity*, p. 113.

For a valuable note on extinguishment of the equity of redemption under informal mortgages, see note to *Conover v. Palmer*, 60 Misc. (N. Y.), 241 in 22 *Harvard Law Rev.* 295.

L. M. G.

STATUTE OF LIMITATIONS. In *Johnson v. Beattie*, 93 Atl. 250 (Vt. 1915), the action was on the case against a sheriff for failing to return a writ of attachment on real estate and bank stock issued January 2, 1909, and returnable within 21 days. A levy had been made under the writ on property sufficient to satisfy plaintiff's claim. Before the return-day another attachment was levied on the same property at the instance of one Willard. Sheriff pleaded statute of limitations, and plaintiff replied that there was a prior attachment on the real estate for more than its value, which attach-



ment was not dissolved until February 12, 1913, after which plaintiff (here) again attached the real estate (the debtor then having no other property, etc.), but was cut out by the Willard attachment. A demurrer to the replication was sustained. This action had been commenced January 16, 1914.

The statute of limitations provided that actions "shall be commenced within four years after the cause of action accrues."

In essence, the question here appears to be this: what is the time of an act? Is it the beginning or the ending of a definite causal chain of events subject to the control, at any point, of human will? Of course, there is neither beginning or ending in the experiential world, of such a chain; it is infinite both in duration and in effect. However, the law as a practical science and art must fix arbitrary boundaries for the flow of time and for the scope of causation. One of these elements is harnessed to the calendar; the other to the human will. But, nevertheless, an act is still a complex idea. It is constituted of several stages, the most distinct of which are: 1, mental origin (positive or negative, involving motive, desire, foresight, advertance, inadvertance, mental negativity); 2, muscular activity (or inactivity); 3, motions in the external world, as products of the first two elements, acting and reacting upon other chains of causation; 4, effects in the external world abstracted from the entire infinite field of objective phenomena under the highly indefinite label "natural," "probable," "reasonably to be foreseen," "damages," "consequential damages," etc.

Plaintiff's contention amounted to this: that the violation of his right was determined, not as of the time that the officer failed to perform the duty commanded by statute—to return the writ of attachment within 21 days—but as of the time that it affirmatively appeared in the chain of causation, that the plaintiff had suffered a financial loss which in this case was determined by the dissolution of the prior attachment. Or, in terms of the above analysis, the right was not violated until the last element in the chain had become manifest. Conceivably that final element might not be disclosed for many years after the time of the efficient cause of the harmful effect complained of; it might be many years after the officer's term of duty; it might even be in a later period following the death of the officer and the closing of his estate. Even the bare possibilities of such a situation make the rule contended for highly unattractive from the point of view of a public officer or his sureties; and, since the common law is based in large part on considerations of expediency, it might be expected, even on the narrow ground of impression unfortified by external data, that what seems to be the rule of convenience, would, unless historical accident had intervened, prevail. And such also is the fact. It was held in this case that the demurrer was properly sustained. The probable effect of the judgment, and such was the reasoning, is that the statute began to run immediately after the last day on which the writ of attachment could effectively have been returned—from the moment when the duty,

suspended until performance or breach, could no longer be lawfully performed. The case is supported by the great preponderance of authority both in England and in America.

There are a few minority cases in Connecticut, Colorado, and Tennessee, which are based on the proposition that breach of official duty is not of itself a violation of private duty; and that there is no breach of private duty in such cases until and unless there results from the breach of public duty a private loss by which the statute of limitations is measured. Upon that theory, the result would have been favorable for the plaintiff. There is much on the surface to commend this solution. It would discourage suits to recover nominal damages arising from infringement of an abstract right unaccompanied by substantial loss; it would relieve a plaintiff of the necessity of speculating at his own risk by remaining passive, on the outcome of a breach of public duty; it would look to the substance rather than the form. It would put cases of this kind on the same basis as others which involve the proposition of consequential damages; that is to say, those cases where an act is performed which does not involve a present wrong, but which in the chain of causation eventuates in an injury to another. It is believed, however, that the balance of convenience and expediency accords with the weight of authority; and that the rule adopted is consistent with the general latter-day attitude toward statutes of limitation as well expressed by Story. (1 Pet. 351, 360). A. K.

**MUNICIPAL COURT—WRIT OF ERROR OR APPEAL IN FOURTH CLASS CASES—ANOTHER PORTION OF SECTION 23 OF THE MUNICIPAL COURT ACT HELD UNCONSTITUTIONAL—FOURTH CLASS CASES NOW REVIEWABLE BY APPEAL.**—In the case of *H. & A. Israelstan v. the United States Casualty Co.*, 272 Ill. 161, 111 N. E. 602 (opinion filed February 16, 1916), it is held by our Supreme Court that the provision of section 23 of the Municipal Court Act which provides that judgments in fourth class cases can be reviewed by the Appellate Court on writ of error only is invalid as in conflict with section 29 of article 6 of the constitution. It would seem this would permit fourth class cases in future to be subject to review through the method of appeal, whereas heretofore they have only been reviewable through the means of a writ of error.

The facts in this case are that a judgment was rendered in the Municipal Court of Chicago against the United States Casualty Co. for \$839.16 and costs. An appeal was taken from such judgment to the Appellate Court for the First District, where on motion the appeal was dismissed upon the ground that the Appellate Court had no jurisdiction to hear the appeal in view of section 23 of the Municipal Court, which in part provides as follows:

"That the final orders and judgments of the Municipal Court in cases of the fourth class and cases of the fifth class mentioned in section 2 of this act shall be reviewed by writ of error only."

A certificate of importance was granted, whereupon the appeal in question was perfected to the Supreme Court, the sole

question considered by the court being, "Does an appeal lie to the Appellate Court to review a judgment entered by the Municipal Court of Chicago in a fourth class case." The Supreme Court in the instant case decides that such an appeal does lie, regardless of section 23 and holds that portion of section 23 above quoted to be invalid because it deprives the Appellate Court of its jurisdiction conferred by other legislative acts. The reasoning of the court in the instant case appears to be that inasmuch as the Practice Act and the Appellate Court Act give the right of appeal in a certain class of cases from "City Courts" to Appellate Courts, that this also includes the same right of appeal in the same class of cases in the Municipal Court.

It is conceded in the opinion that the right of appeal is purely statutory and that there is no statute which by express terms purports to give the right of appeal to the Appellate Court from judgments of the Municipal Court in fourth class cases, but the opinion proceeds to consider the appellant's contention that the Municipal Court is a City Court within the meaning of the Appellate Court and Practice Acts now in force, and adopts the contention of the appellant upon the theory that the Municipal Court must be regarded as a City Court within the terms of the Appellate Court and Practice Acts and that there is no substantial difference between the terms "City Court" and "Municipal Court" both of which are courts of the municipality in which they are established.

This decision is in harmony with the previous decisions of the court in relation to the constitutionality of certain sections or portions of sections of the Municipal Court Act. In relation to this particular section 23, the Supreme Court has previously held that a further portion, to-wit, that portion limiting the time within which a writ of error may be sued out in a fourth class case to thirty days after the entry of the final order of the judgment complained of is invalid. *Hoffman v. Paradis*, 259 Ill. 111, 8 ILLINOIS LAW REVIEW 342. Other cases holding that portions of the Municipal Court Act are invalid upon the ground substantially set forth in the instant case are *Clowry v. Holmes*, 238 Ill. 577; *People v. Hibernian Banking Association*, 245 Ill. 522; *People v. Cosmopolitan Fire Insurance Co.*, 246 Ill. 542; *Hoskins v. Southern Pacific Railway Co.*, 243 Ill. 320 and *Sixby v. Chicago Railway Co.*, 260 Ill. 478. The reasoning in the instant case is therefore not without precedent. It is undoubtedly technically correct. In our very respectful opinion, however, it is subject to the same criticism as made of the cases of *Hoffman v. Paradis* and *Sixby v. Chicago Railway Co.*, *Supra*, found in 8 ILLINOIS LAW REVIEW 342 and 8 ILLINOIS LAW REVIEW 559. It is again submitted that a more liberal construction of the Municipal Court Act could properly be made both on precedent and with logic, so that these sections and the previous sections so held unconstitutional could be sustained to perform the function for which they were intended.

The court in the instant case admits that there is no direct Statute expressly giving the right of appeal in a fourth class case

of the Municipal Court, but by construction classes the Municipal Court with a City Court. Section 29 of article 6 of the constitution referred to in the opinion as the uniformity clause provides as follows:

"That the jurisdiction, powers, proceedings and practice of all courts of the same class or grade must be general and of uniform operation."

The Supreme Court in the instant case admits that the jurisdiction of courts established under what is called the City Court Act and the Municipal Court Act is not the same as to the class of cases, but inasmuch as their territorial jurisdiction is the same, construes this to mean that the Municipal Court is of the same class or grade as City Courts. It is respectfully submitted that the Municipal Court is not of the same class or grade as the City Court; that their geographical jurisdiction should not be made the controlling element in deciding a question of this kind. The practice in said courts, the class of cases over which they have jurisdiction and the procedure therein is essentially different one from the other. There is no point of likeness in them and further than that, it is submitted that section 34 of article 4 of the constitution expressly provides that the practice in the Municipal Court of Chicago may be different than in other courts of record.

In the case of *People v. Cosmopolitan Fire Insurance Co.*, 246 Ill. 442, referred to in the opinion of the Supreme Court in the instant case, it was held that the legislature may in an act establishing a court, provide for a review of its judgments and the practice on such review without violating section 13 of article 4 of the constitution. It is submitted that this is controlling on the question in the case at bar and that for these reasons neither the Practice Act nor the Appellate Court Act can properly be construed to control the practice on review from the Municipal Court in view of the express provisions of the Municipal Court Act.

R. R. H.

CONTRACTS—LEGALITY—RESTRICTIVE COVENANTS IN CONTRACTS FOR SALE OF BUSINESS.—The United States Circuit Court of Appeals, in the case of *Hall Manufacturing Company v. Western Steel & Iron Works, et al.*, 227 Fed. 588, was confronted with a restrictive covenant unlimited as to time and place; the covenantor agreed upon the sale of its business (both parties being corporations) "not again to go into the manufacture of post-hole augers and diggers." The decision, that this covenant was not illegal and, therefore, not void, is but another evidence of the fact that, although many branches of the law have failed to keep pace with the advancement in commerce and science, that failure is, in no sense, general.

"In the first reported case," says the court, "decided in 1415 \* \* \* covenants were held to be unenforcible, no matter how limited in time and place." From that time until this, the decisions cited by the court show a gradual but steady adjustment and readjustment of the law to the changing conditions of trade, until this latest law—reached by hardly perceptible changes—is found, when compared directly with its remotest source, to be

diametrically opposed to it. From the earliest decision on a contract in restraint of trade, the courts have stated repeatedly that the validity of such a contract is determined by its general tendency at the time it was entered into, and if this tendency was injurious, it would be declared void, even though the intent of the parties was good, and no injury would result in the particular case.

It is interesting to note the considerations which have so radically changed the decisions of the courts in this class of contracts—that is, from the extreme of holding contracts void as in restraint of trade, even though limited as to time and place, to that of holding a contract valid and not in violation of public policy, when unlimited either as to time or place. The decision here reviewed is one of the last steps in the change spoken of, and may be briefly outlined as follows:

A statement by Justice Bradley in *Oregon Steam Navigation Company v. Winsor*, 20 Wall. 64, 68, often cited in connection with restrictive covenants, states that "there are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry, and the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family." In the principal case these reasons are held inapplicable, because the covenantor was a corporation. "If," the court states, "any stockholder or officer is skilled in any profession or art, he is not restrained from exercising his skill by the corporation's covenant. Even the capital \* \* \* may be reinvested in the same business \* \* \* outside of the appellee covenantor corporation."

This would seem to place corporations beyond the operation of the doctrine of public policy as to contracts in restraint of trade, and presents grounds for speculation as to the possible results of a logical development along the lines of this portion of the decision. But the court presents other and affirmative reasons for its decision in addition to these negative grounds: The court states that before a contract can be held to be invalid because in restraint of trade, it must be shown to the satisfaction of the court, that the injury to the public outweighs two interests equally as vital to the public, to-wit: "the public policies of honesty and of freedom of alienation." The court further states as the sole arbiter of the validity of the restriction, its reasonableness under the circumstances of the particular case without reference to the presence or absence of limitations as to time or place.

The federal court in this decision is at the head of the most progressive jurisdictions in the tendency to break away from the old rule; but many still demand some limitations to support the validity of a restrictive covenant. Either time or place limitation is held sufficient in: *Smith v. Webb*, 58 Southern (Ala.) 913; *Moorman & Givens v. Parkerson*, 127 La. 835; and *Artistic Porcelain Co. v.*

*Boch*, 74 Atlantic (N. J.) 680. Both time and place limitations are held necessary in *Consumers' Oil Co., v. Nunnemaker*, 142 Ind. 560; *Meyer v. Estes*, 164 Mass. 457 (but see *Anchor Electric Co. v. Hawkes*, 171 Mass. 101); *Tarr v. Stearman*, 264 Ill., 110, affirming 185 Ill. App. 45; and *Andrews v. Kingsbury*, 212 Ill., 100.

Chicago, Ill.

EDWARD W. STODDARD.

**STREAM WATER RIGHTS—RIGHT TO HAVE THE WATER MAINTAINED AT THE TEMPERATURE WHICH IT WOULD HAVE IN ITS NATURAL CONDITION.**—In *Sandusky Portland Cement Co. v. Dixon Pure Ice Co.*, 221 Fed. 200 (C. C. A. Seventh Circuit), in an Illinois case, a novel question in the law appears to have come before the court. The case arose upon a bill for injunction brought by the Dixon Pure Ice Co., appellee, against the Sandusky Portland Cement Co., appellant, to enjoin the latter from causing heated water to flow into the river and thus retard the formation of ice in the part of the river from which the appellee obtained its ice. It appeared that the parties were each, owners of riparian rights upon the south bank of the Rock River, near Dixon, Illinois. Appellee operated an ice plant and took its ice from the Rock River opposite its plant. Appellant operated a cement factory located further up the stream from the plant of appellee, and took from the river 3,000,000 to 4,000,000 gallons of water per day for cooling purposes in connection with its condensing machinery. This water was returned to the river within the bounds of appellant's riparian ownership, but when it got back to the river, it was heated to a temperature of from 50 to 60 degrees. The evidence of the appellant was to the effect that the increase in temperature of the water of the stream caused by the introduction of the stream of water from appellant's plant, was only 47-100 of a degree, that the discharge into the river of water heated in the cooling of machinery, was usual in that locality and that it was not possible, without incurring prohibitive outlay, to reduce the temperature of the water at the point of discharge and that restraining such discharge would deprive appellant of the use of the stream for machinery cooling purposes. The court in its treatment of the problem, invokes a rule similar to that which obtains in the case of throwing foreign substance into a stream and following the rule in the case of *Tetherington Coal Co. v. Donk Bros. Coal Co.*, 232 Ill. 522, holds that the use of the water by appellant in this case was an unreasonable use, such as ought to be enjoined.

In its argument the court proceeds from the theory that each riparian owner is entitled to the reasonable use of the water even though such use may cause some injury to the other riparian owners, and cites as an illustration of the application of that principle, the case of *Palmer v. Mulligan*, 3 Caines (N. Y.) 307, where, so the court says, it was held that the upper owner had the right to erect a dam when necessary for the enjoyment of his riparian rights, even though such obstruction necessitated increased expense on the

part of the lower owner and greater difficulty in getting logs to his mill, provided enough water was left to work the lower mill. The court cites, also, the cases of *Gould v. Boston Duck Co.*, 13 Gray (Mass.) 442 and *Keeney & Wood Manufacturing Co. v. Union Manufacturing Co.*, 39 Conn. 576.

It would seem that the result finally reached in the principal case is in accord with the weight of authorities. Doubtless, it is true, the one owner on a stream is in somewhat the same position with reference to his use of that stream and the use by his neighbor of the same stream, as the owners of two adjoining pieces of real estate with reference to their rights of use of their respective pieces of real estate. The maxim: So use your own as not to injure your neighbor in the use of his, would seem to apply. 6 ILLINOIS LAW REVIEW, 387, 388.

There is, however, one great point of distinction between the use of a piece of land, and the use of water right. The property in the former case is a definite quantity and quality; that in the latter depends for its quantity directly upon the number of riparian owners and upon the volume of the stream at the particular time (6 ILLINOIS LAW REVIEW, 385), and for its quality, possibly, upon the predominant character of user of that particular stream, or of streams in that particular locality. 6 ILLINOIS LAW REVIEW, 388, 389, 390. It would follow that in the problem of the principal case, while the general rule of reasonableness or unreasonableness of use is to be applied, the determination of what is reasonable and what is not, must invoke still other rules.

Thus one reverts to the fundamental rule of proportion. A riparian owner is entitled to his share of the stream as it flows by his land, and must not interfere with the like enjoyment of the lower owner of the same proportion, and any interference with the condition of the stream so that the lower owner does not get his proportion, whether he uses it or not, furnishes a cause of action. 6 ILLINOIS LAW REVIEW, 385. Thus in the case of pollution, a throwing of foreign substance into the stream the noxious effect of which is dissipated before the water gets to the lower owner, would furnish no cause of action. 6 ILLINOIS LAW REVIEW, 388. Likewise throwing warm water into a stream under circumstances so that it does not substantially increase the temperature of the water that reaches the lower owner, would not give cause for complaint. But it is the act of affecting that share of the stream to which the lower owner is entitled, that affords ground for complaint.

It is believed a caution is opportune against a construction of the language in the principal case to the effect that an upper owner can compel a lower owner to go to expense, in the lawful use of his proportion of the stream, to save himself from inconvenience on account of the particular use of a stream by the upper owner. It is believed that neither the principal case nor the cases cited by the court arrive at any such conclusion. The cases, however, do hold that, in the use of a stream, the various owners may lawfully be

put to some inconvenience in the use which each may be making of the stream, and such inconvenience must be considered as qualifying the respective proportions of the stream to which each may be entitled.

That would seem to be the result of the cases, *Palmer v. Mulligan*, 3 Canies (N. Y.) 308-312, *Gould v. Boston Duck Co.*, 79 Mass. 442 and *Keeney & Wood Manufacturing Co. v. Union Manufacturing Co.*, 39 Com. 376. In these cases the owners had no absolute right to erect dams and thus use water for mill purposes. All they had was relative rights so to do, and the degree of the right depended upon proportion, both as to quantity and degree of use; the Connecticut case, possibly proceeding strictly upon the theory of predominant character of the use; and lest the one aspect of the case of *Palmer v. Mulligan* mislead, viz., the difficulty of bringing timber into the saw mill of the lower owner and the presence of rubbish in the water from the mill above, it should be borne in mind, that apart from a right in common with the public, a riparian owner has no peculiar rights of navigation of a stream, and that at once would raise the question of navigability of the stream.

E. M. L.

**PUBLIC AND PRIVATE RIGHTS IN STREAMS—WHARFS—RIGHT OF UNITED STATES TO ORDER REMOVAL.**—In 9 *Illinois Law Review*, 565-570, 571, 572, the paramount power inherent in the federal government to regulate and control navigable streams, was alluded to. Such right exists without question, nor is it understood that the dissenting opinion in the recent case of *Greenleaf Lumber Co. v. Garrison*, 237 U. S., 251, 35 Sup. 55, at all questions the soundness of this rule. However, as it appears set forth in said volume of the ILLINOIS LAW REVIEW, the rule was considered rather in connection with obstructions and interferences with that part of the stream which was reputed to be the navigable part of the stream and so used by the public. The case of *Greenleaf Lumber Co. v. Garrison* is, therefore, looked upon as raising a new point, and the decision thereon becomes a most valuable addition to the law of rights in streams regardless of the spirit of welcome or hostility with which it may be received by various members of the legal fraternity throughout the country, and, particularly, this state.

In that case the complainant was the owner of a wharf that projected out into the river, but not beyond the line which the Secretary of War had fixed as the line of navigability of the stream (harbor line). To accommodate the plans of the war department, it became advisable, if not necessary, to widen the navigable part of the stream at this point, the Norfolk navy yard being directly opposite the wharf of complainant, and an appropriation was made by Congress "for the purchase of land and widening the channel" (p. 269, Mr. Justice Lamar's dissenting opinion). After starting condemnation proceedings to condemn part of the wharf of complainant for that purpose, the government dismissed the bill and, claiming to act under its power of regulation and control of public



streams, declared that much of the wharf a nuisance and ordered its removal. Substantially this was the situation presented to the Supreme Court.

Thus presented, it is submitted the case affords but one question: Has the federal government the power at its discretion to vary the lines within the stream which were theretofore established by it as marking the boundaries of the navigable part of the stream? If it has, it would seem to follow that any wharfs or other obstructions in that additional part of the river thus declared to be navigable, would interfere with public travel and thus be abatable. The majority opinion held that it had such power and (in effect) that all persons who built structures out into the river even though not into the part at that particular time used for navigation, and even though built in reliance on the lines then established by the government, and upon that part of the bed of the stream, title to which was in them, must nevertheless be taken to have so built the structures in contemplation of this power of the government to change the lines of navigability of the river to suit increased needs of navigation, without compensating the owners of the structures for such structures or parts thereof thereby required to be demolished.

The arguments *pro* and *con* are set forth in the majority and dissenting opinions respectively, and it would be affectation for the writer to express any opinion upon the correctness of the decision.

The situation would hardly arise unless the title to the bed of the stream upon which the structure rested, was in the owner of the structure (9 *Illinois Law Review*, 573). That was the situation in the case under discussion, and that, of course, would be the situation as to all streams in this state. The law of the state in the principal case apparently gave the riparian owner title to the low water mark (237 U. S. 257).

E. M. L.

VOID TAX DEEDS—RIGHT OF HOLDER TO REIMBURSEMENT—MUNICIPAL CORPORATIONS.—In *City of Chicago v. Gage*, 268 Ill. 232, 109 N. E. 28, our Supreme Court adheres to the rule of *City of Chicago v. Pick*, 251 Ill. 594, 7 *Illinois Law Review*, 132, to the extent of holding invalid the amendment of 1913 to section 72 of the Local Improvement Act. That amendment was designed, apparently, to secure to municipalities who had taken certificates of sale of lands for delinquent special assessments or tax deeds pursuant to such sales, reimbursement in any event where such certificates or deeds were held to be void. The court considered that such a provision in favor of municipalities was a discrimination against other holders of tax sale certificates or tax deeds.

E. M. L.

RIPARIAN RIGHTS IN STREAMS.—From the recent case of *Archer v. Greenville Gravel Co.*, 233 U. S. 60-66, 34 Sup. 567, it would seem that the law in Mississippi is the same as that of Illinois upon the question of the right of a riparian owner to object to any use of the bordering stream by the public except for the bare

purpose of navigation. In that case a gravel company was enjoined from dredging for gravel in the river along side of the complainant's land and within the half of the bed adjacent to complainant's shore line. That this is the law in Illinois is seen in 9 *Illinois Law Review*, 564, on pp. 571 and 572.

E. M. L.

QUASI-EASEMENTS — IMPLIED GRANT — RIGHT OF A NON-RIPARIAN OWNER TO OBJECT TO EXCESSIVE USE OF WATER RIGHTS. — The case of *Allot v. American Strawboard Co.*, 267 Ill. 272, 108 N. E. 284, is a good example of the application to water rights of the rule of implied grants or quasi-easements. In that case the owner of lots and land upon which there was a dam which supplied water power to other lots also owned by him, conveyed the other lots apart from the dam and without reference to rights of water power from the dam. The court uses language as follows: "the conveyance of a thing imports a grant of it as it actually exists at the time the conveyance is made, unless a contrary intention is manifested in the grant." This is the language so often used by our Supreme Court, and it is submitted, too general for a working rule. The true rule has been suggested heretofore, (3 *Illinois Law Review*, p. 87; 4 *Illinois Law Review*, 430) viz., is the right *de facto* in existence, continuous and apparent, which the right in the principal case, doubtless was.

Attention is called, in the same case, to the reiteration of the rule heretofore stated by our Supreme Court; that no one can object to excessive use by a riparian owner of his rights in the stream except another riparian owner whose rights in that stream are encroached upon thereby. 6 *Illinois Law Review*, 384.

It should be remarked that the principal case is very valuable in the principles of construction of easement-granting instruments therein applied. The principles are highly technical, however, and it is believed that this note has served its purpose by calling attention thereto.

E. M. L.

# BOOKS AND PERIODICALS

## NEW BOOKS

COMMENTARIES ON THE LAWS OF ENGLAND. By Sir William Blackstone, Knt. Edited by William Carey Jones. San Francisco: Bancroft-Whitney Company, 1915. 2 vols. Pp. cxxi, 2770.

We welcome this new edition of the great commentaries. It gives them to the student in their full integrity of text, but with a new body of apparatus exactly adapted to the times.

At the outset, the editor sounds the note of inspiration for the reader by a motto-page bearing that lofty passage of encomium on the common law from Sir F. Pollock's "Oxford Lectures." Then follow the editor's preface; then a biographical introduction by the editor, setting forth Sir Wm. Blackstone's career and the place of the commentaries in our legal literature (it is too modestly placed in small type); and this is followed by the late Professor W. G. Hammond's bibliography of the commentaries.

The text accepted for this edition is rightly that of Hammond; and this is all the more fitting as the plates of the Hammond edition were destroyed in the San Francisco fire of 1906, and that work is now out of print.

The new body of annotations is the special change which this edition offers—an offering which deserves the gratitude of the profession and is bound to make this edition supplant any and all others for another generation.

In the first place, the great bulk of citations of cases which once uselessly engrossed the footnotes has disappeared; these had little or no service for the student of Blackstone. In their place are put quotations or original disquisitions which comment on the history and legal theory of the text. This is what the commentaries need for bridging the gap between then and now, and for supplying the reader in the same perusal with the modern aspect of the Blackstonian topics. These footnotes are in part taken from other authoritative treatises and in particular from the best of Professor Hammond's scholarly footnotes and from Professor Jenks's edition (1914) of Stephen's Commentaries; and in part are contributed by the editor's colleagues in the University of California, Professors McMurray, Kidd, Lynch and Harrison, as well as by the learned editor himself.

But, in the second place, the great refreshing feature is that the footnotes breathe the full spirit of today's critical knowledge in history and in legal theory. At last we have a Blackstone which is of today. At last the footnotes look forward, not backward. At last they have freed themselves from that dead-and-alive mixture of antiquarianism and quasi-modern decisions which made the whole book seem too obviously a relic of the past. At last there is a Blackstone which the young man can read with the confidence that

his necessary mastery of the classic doctrines of the text will go hand in hand with an introduction to all modern viewpoints that guide him to the pathways of contemporary legal ideas.

Merely to name the authors quoted would illustrate the modernity of this enlightenment—Maitland, Ames, Stephen, Vinogradoff, Thayer, Holdsworth, Salmond, Holland, and the like. We cannot be too thankful that a student's first book is so edited as to lead him into a just familiarity with the names of those whom he must thereafter respect as the authorities in his professional literature. The time was not so long ago when the Supreme Court of the United States could decide the historical question of the composition of the jury by citing Blackstone only. It is depressing to think of the hundreds of state Supreme Court judges who do not know that the historians Maitland, Pollock, Ames, Thayer, ever wrote or existed. The total lack of any sound critical standards in most of our courts is due chiefly to the circumstances that throughout their legal education these learned expounders never had the true authorities held up to their observance. This edition of Blackstone will serve in the long run the beneficent purpose of educating bar and bench to respect those who ought to be respected, and to discard alike the outworn guides of a past age and the hack-writers of today.

Here we may mention a few examples of this treatment of the notes.

(1) In Book I, at page 18, where Blackstone's text on the "Vogue of the (Roman) Civil Law" embodies what was known in his day, three footnotes give us long quotations from Vinogradoff and Pollock, setting forth the latest modern knowledge.

(2) On pp. 23, 34, footnotes to the sections on "Inns of Court" tell us of the transition to legal education in modern England.

(3) At p. 72, to amplify Blackstone's account of prior legal writers, the editor abridges Brunner's account from the "Select Essays in Anglo-American Legal History."

(4) At p. 449, in a footnote on "Religious Instruction in American Schools," we find duly cited Professor Schofield's masterly and unique account of the law of that subject.

(5) At p. 475 and at p. 485, footnotes on corporations, is quoted Professor Williston's pioneer historical essay on "Business Corporations Before 1800."

(6) At p. 173, in a note on the Rule in Shelley's Case is duly cited Professor Kales' masterpiece on "Future Interests."

(7) In Book II, at p. 342, under "Registration of Deeds," is quoted Professor Beale's historical article, and an account is given of the Torrens system of registration of title.

(8) In Book III, at p. 120, under "Assault," is an ample note on the modern right of recovery for illness caused by fright, with a citation of Professor Burdick's article.

(9) At p. 126 is a careful note on the modern doctrine of the Right of Privacy.

(10) At p. 426, a note fully supplements in the light of modern learning Blackstone's imperfect account of chancery jurisdiction.

(11) In Book IV, at p. 7, under "Punishment of Crime," a note on "Modern Conception of the Philosophy and Science of Crime" puts the reader in touch with the best results of modern thought; and at p. 24, another note on "Relation of Madness to Criminal Responsibility" brings the subject down to date from Blackstone's time with illuminating fullness.

These casual instances will show what a regeneration has here been accomplished in making the great commentaries a usable and useful book.

A reviewer, to be sure, always finds details with which he does not agree; and in the enormous mass of details here covered, it would be strange if the tastes and demands of all readers could be equally satisfied. Of the few details discovered by the present reviewer which he would have preferred to find otherwise, these are samples:

(1) Book II, p. 19, "Rights in Superjacent Space"; the footnote cites the cases amply, but refers to none of the valuable discussions of this modern question in books or articles, such as Mr. Blewett Lee's essay and Dr. Harold Hazeltine's book. (2) In Book II, p. 215, under "Origin of Primogeniture," no footnote either corrects Blackstone's history or refers the reader to such a source as Cecil's "History of Primogeniture." (3) In Book III, p. 350, under "History of Trial by Jury," the five-line footnote merely refers the reader to the works of Thayer, Bigelow, Pollock and Maitland, Holdsworth, and Jenks; but Blackstone's historical errors (of his time) on this great subject are so pernicious and so widely believed that the rising generation should have had the antidote fully spread out for unavoidable consumption. (4) In Book IV, p. 157, under "Forestalling" and "Monopolies," the space taken for a footnote on modern English statutes against cheating and for Mr. Justice Field's dissenting opinion in the Slaughterhouse Cases could better have been given to a summary of the history of economic penal legislation in this region. (5) At p. 292, the long list of barren citations on the law of Arrest could better have been replaced by an historical note, containing the account (which was in the making when Blackstone laid down his pen) of the results of Wilkes's great struggle (Blackstone does not deign to mention the demagogue Wilkes, of course) against general warrants, and introducing the student to the inspiring memories of James Otis in Boston and the later American constitutional clause. (6) In Blackstone's final historical chapter (a masterpiece of its kind) on "The Progress of the Laws of England," the editor's acceptance of Professor Jenks's example, in declining to making copious criticism of Blackstone's history in the footnotes, is open to question; the task would have been the most difficult of all, but it would have been as well worth attempting as anything else in the book.

But, having vindicated the privileges of the captious reviewer, we close with a resolution of thankfulness that a Blackstone edition has now been produced which is an ornament to American scholarship, a reflection of the best modern thought, and a fitting guide to the earnest beginner in the law.

J. H. W.

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# ILLINOIS LAW REVIEW

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## THE HAGUE CONVENTION OF 1912, RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES: A COMPARISON WITH ANGLO-AMERICAN LAW.

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### A. THE HAGUE CONVENTION

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Notwithstanding its common origin, the law relating to bills of exchange has assumed a great variety of forms in the different countries. Three principal systems developed: the French, the German, and the Anglo-American.<sup>2</sup> The greatest divergence existed in matters of detail. Even in the most recent times there were not less than forty different bills of exchange acts outside the Anglo-American group. With the rapid growth of international trade, during the last century, the advantages of a uniform commercial law among the civilized nations of the world became more and more apparent. In the matter of bills and notes, especially, it seemed that such unification was within the realm of actual realization. At the beginning of the twentieth century the time appeared

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2. The following are the principal countries belonging to the French group: Argentine Republic, Bolivia, Brazil, Chile, Columbia, Ecuador, Egypt, France, Greece, Guatemala, Hayti, Luxemburg, Monaco, Mexico, Netherlands, Nicaragua, Panama, Paraguay, Polish Russia, Servia, Turkey, Uruguay.

The following are the principal countries belonging to the German group: Austria-Hungary, Bulgaria, Denmark, Germany, Italy, Japan, Norway, Peru, Portugal, Roumania, Russia (exclusive of Polish Russia), Salvador, Sweden, Switzerland, Venezuela.

*Dr. Felix Meyer*, in his "Weltwechselrecht," I, pp. 25-27, assigns Belgium, Cuba, Honduras, Malta, the Philippines, Porto Rico, and Spain to a fourth group which stands intermediate between the French and German groups.

ripe at last for the consummation of this plan. At a conference, which met at The Hague in 1910, an advance draft of a uniform law relating to bills and notes was prepared. At a second conference, in 1912, a Uniform Law and Convention were actually adopted.<sup>3</sup> The convention entered into as a result of these conferences, has been signed by practically all of the European countries, by a number of Central and South American states, and by China and Japan. The British and American delegates made it clear at both conferences, that Great Britain and the United States, though greatly interested in the international unification of the law, were not in a position to become parties to an international convention. The signatory powers to the convention have assumed the obligation to adopt the Uniform Law textually without any derogations, except in so far as they may be expressly authorized by the convention itself. As long as the convention is in force in a given country, its provisions wholly supplant the former national law. It deals with the entire subject of bills and notes, and does not apply solely to international operations. The contracting powers are not bound indefinitely, however, and may denounce the convention after three years from the date of the first deposit of ratifications. Defects in the present convention are to be corrected at a future conference which shall be called by the government of the Netherlands after a lapse of five years from the first deposit of ratifications or after the lapse of two years, upon the request of any five contracting states.<sup>4</sup>

Notwithstanding the above provisions for the denunciation of the convention and its modification at a future conference, it was impossible to reach an agreement on all points. In regard to some matters, the national law seemed so important to certain countries that rather than to make concessions with respect to them, they pre-

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3. The proceedings of these conferences were published officially under the title of "Conférence de la Haye pour l'Unification du Droit relatif à La Lettre de Change," 1910, "Actes," pp. 388; "Documents," pp. 429; 1912, "Actes," I, pp. 264; II, pp. 421; "Documents," I, pp. 247; II, pp. 147. They are contained also in translated form in two reports to the Secretary of State by *Mr. Charles A. Conant*, American delegate to the conferences, which are printed as Senate Document, No. 768, 61st Congress, 3d session, and as Senate Document, No. 162, 63d Congress, 1st session.

The original proceedings will be cited in this article as "Actes, 1910, 1912;" "Documents, 1910, 1912." The proceedings in their translated form will be referred to as "Proceedings, 1910, 1912."

At the second conference an advance draft of a uniform law was adopted also, which is to be the subject of further consideration at another conference.

4. See Arts. 1, 27-30 of Convention.



ferred not to become parties to the proposed convention. Reservations had to be made in these instances in favor of the national law of the contracting states.<sup>5</sup>

Though complete uniformity was unattainable, the adoption of the Uniform Law constitutes nevertheless a great advance over previously existing conditions. It has united the countries outside the Anglo-American group into one great system. The differences in the law of bills and notes will in the future be reduced, therefore, in the main to those existing between the Anglo-American system and that of the Hague convention. It is the object of the present article to point out the differences in the law of these two systems. Before doing so, a few general observations must be made concerning the Uniform Law, the Bills of Exchange Act, and the Negotiable Instruments Law.

The most striking contrast between the Uniform Law and the English and American acts, is due to the fact that the Uniform Law deals only with the so-called "formal" law of bills and notes. In this respect it follows the German Bills of Exchange Law of 1849. When a uniform bills of exchange act was drafted for the different states belonging to the Zollverein, the diversity of the systems of law existing in the states made it evident that unless all rules which had direct reference to the general law were eliminated, it would fail of adoption. So it came that the German Bills of Exchange Law embraced only the "formal" law relating to bills and notes, that is, the special rules resulting from the formal nature of the instrument. The same necessity of eliminating all rules directly connected with the general law presented itself at the Hague conferences. No agreement whatever could have been reached except as to the "formal" law relating to bills and notes. Many provisions found in the Bills of Exchange Act and the Negotiable Instruments Law are excluded from the Uniform Law for the simple reason that they were deemed to fall outside of the "formal" law of bills of exchange.

Another difference, which is very prominent, consists in the fact that with regard to almost all of the topics treated, the Bills of Exchange Act, and the Negotiable Instruments Law go into greater detail than does the Uniform Law. This difference is due, not so much to the circumstance that the Uniform Law is an international code, which, for practical reasons, must be expressed in

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5. These reservations are found in Arts. 2-22 of the Convention.

more general terms than a national law,<sup>6</sup> as to a fundamental difference in the aims of the Anglo-American and the continental legislators in the matter of codification. The Bills of Exchange Act and the Negotiable Instruments Law are primarily re-enactments of the law laid down by the courts. So far as the courts have dealt with the matter, the English and American acts lay down specific rules. Continental codes, on the other hand, usually prescribe only general rules which the judges apply in a particular case as justice may demand.

## B. THE UNIFORM LAW AND THE ANGLO-AMERICAN LAW CONTRASTED<sup>7</sup>

### I. FORM AND INTERPRETATION.

*Unconditional Order or Promise to Pay.* This requirement results from the very nature of the instruments, with respect to which there can be no disagreement. In Anglo-American law an unqualified order or promise to pay is unconditional, though coupled with: (1), an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2), a statement of the transaction which gives rise to the instrument.<sup>8</sup> Whether such additional provisions would be allowed in the continental countries is doubtful.<sup>9</sup> There is no express provision with reference to this question in the Uniform Law.

*A sum certain.* The Uniform Law allows a stipulation for interest only in bills and notes payable at sight, or a certain time after sight. In any other case, the stipulation is void. If the rate of interest is not fixed in the bill, it is to be five per cent. Interest is to run from the date of the instrument, if no other date is specified.<sup>10</sup>

These provisions adopt a middle ground between the Anglo-American view and the rule formerly prevailing in many of the continental countries. In Austria, for example, a stipulation for

6. The Uniform Law goes actually into greater details than many of the national laws.

7. The Convention and Uniform Law are printed in the original French and in an English translation in *Mr. Conan's* report of 1912, pp. 37-66 (Senate Document, No. 162, 63d Congress, 1st session). For convenience of reference this translation has been adopted for the purposes of this article, except with respect to Art. 20 of Convention, and Arts. 20, 33, 39, 45, 47 and 78 of the Uniform Law, the translation of which is faulty.

8. N. I. L. s. 3; B. E. A. s. 3 (3).

9. See *Meyer*, "Weltwechselrecht," I, p. 133.

10. Arts. 5, 79.

interest made the bill of exchange void.<sup>11</sup> In Germany,<sup>12</sup> and in most of the other countries belonging to the German group,<sup>13</sup> such a stipulation was deemed not written. The Hague convention does not authorize a stipulation for interest with respect to bills and notes having a fixed day of maturity, because the amount of interest can be ascertained accurately in these cases when the instrument is drawn and can be added, therefore, to the principal sum.<sup>14</sup>

*Installments, etc.* Bills and notes payable in installments are void under the Uniform Law<sup>15</sup> which follows the view adopted by a number of continental countries.<sup>16</sup> Nothing is said about bills payable with exchange, or with costs of collection, or an attorney's fee. In some countries, such a provision may render the instrument void; in others it will probably be deemed unwritten, and will, therefore, not affect its validity.<sup>17</sup>

*Money.* According to the Uniform Law, the parties may expressly stipulate that the holder may demand payment in a specified foreign currency.<sup>18</sup> In England and in the United States, such instruments would not constitute bills and notes.<sup>19</sup>

*To Order.* The Uniform Law agrees with the Anglo-American and German<sup>20</sup> law in allowing non-negotiable bills and notes. Although non-negotiable instruments have little importance in dealings among merchants, and, especially, in international transactions, it was deemed unnecessary to adopt the principle of the French group, which requires negotiability as one of the essential elements of bills and notes.<sup>21</sup> According to the Uniform Law, a non-

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11. *Ibid.*, p. 106.

12. Art. 7, German Bills of Exchange Law; *Meyer*, I, p. 100.

13. *Meyer*, I, p. 106.

14. "Proceedings," 1910, p. 238; "Actes," 1910, p. 78.

15. Art. 32, par. 2.

16. *Meyer*, I, p. 127.

17. See *Meyer*, I, p. 98.

18. Art. 40. See also Art. 79. A request of the Mexican delegation that the contracting states be permitted to provide that notwithstanding a stipulation requiring actual payment in foreign money, payment might always be made in the national currency, was denied because such a stipulation was deemed to afford "the only means of doing business with some security in countries where the national currency, under the empire of unforeseen circumstances, may be subjected to sharp fluctuations in value." "Proceedings," 1912, p. 313; "Actes," 1912, I, p. 174.

19. A bill or note must be payable in "money," i. e. legal tender. *Chalmers*, "Bills of Exchange," 6th ed., p. 10.

20. See Art. 9, German Bills of Exchange Law.

21. *Meyer*, I, p. 169; *Thaller*, "Traité Élémentaire de Droit Commercial," 3d ed., p. 699, note; *Williamson*, "The French Law relating to Bills of Exchange," etc., p. 11.

negotiable bill is transferable only in the form and with the effect of an ordinary assignment.<sup>22</sup>

In England and in the United States, also, the indorsement of a non-negotiable bill or note, operates merely as a transfer of the rights of the indorser. With respect to the nature of the liability of such indorser there is no uniformity of view. In the United States the indorser of a non-negotiable note is sometimes regarded, as under the Uniform Law, as a mere assignor.<sup>23</sup> In other jurisdictions, his liability appears to be that of a maker or a guarantor.<sup>24</sup> In still others, he is regarded as an indorser.<sup>25</sup> In England the indorser of a non-negotiable bill is in the nature of a new drawer.<sup>26</sup>

Negotiability not being deemed an essential requisite, the question arose at the first Hague conference whether the intent to execute a negotiable instrument should be expressed or presumed. Inasmuch as in modern times negotiability is the rule and non-negotiability the great exception, most legislators dealing with the subject since the German Bills of Exchange Law have deemed negotiability a natural quality which should impose upon the person executing the instrument the duty of indicating the contrary intent by appropriate words.<sup>27</sup> The Bills of Exchange Act accepted this point of view as a concession to Scotland where the principle had been established as early as the year 1726.<sup>28</sup> A like change was not made in the Negotiable Instruments Law, which re-enacts the old rule that words of order are necessary to give negotiability to the instrument.<sup>29</sup> The Uniform Law adopts the modern view that negotiability should be presumed in the absence of words indicating a contrary intent.<sup>30</sup>

22. Art 10. The same is true of non-negotiable notes. See Art. 79.

23. *Story v. Lamb*, 52 Mich. 525.

24. *McMullen v. Rafferty*, 89 N. Y. 456; *Johnson v. Lassiter*, 115 N. C. 47.

25. *First Nat. Bank v. Falkenhan*, 94 Cal. 141.

26. *Wood's Byles* on "Bills & Notes," 8th ed., 149.

27. *Meyer*, I, pp. 134-135; Art. 9, German Bills of Exchange Law.

28. *Thompson*, "Treatise on the Law of Bills of Exchange," p. 522, note f.

29. Sec. 1, par. 4. In jurisdictions in which bills and notes need not be designated as such, see *infra*, words of negotiability may serve to distinguish them from other similar instruments. That the words "or order" might serve this purpose was admitted at the conference of Leipzig, which drafted the German Bills of Exchange Law. *Thoel*, "Protokolle," p. 14.

30. Art. 10 par. 1. It is interesting to note the development of the law concerning the negotiability of bills of exchange. Until the end of the sixteenth century, it seems, bills of exchange were exclusively non-negotiable. Negotiability was recognized only after a considerable struggle, and was not fully established until the middle of the seventeenth century. See *Biener*, "Wechselrechtliche Abhandlungen," p. 121; *Goldschmidt*, "Handbuch des

*Or Bearer.* Bills of Exchange payable to bearer are almost of equal age with bills payable to order.<sup>31</sup> They were prohibited, however, in France, in 1716,<sup>32</sup> and are allowed today in none of the continental countries.<sup>33</sup> Promissory notes payable to bearer are authorized in the countries belonging to the French group.<sup>34</sup> Anglo-American countries and Japan are practically the only ones recognizing bills of exchange payable to bearer. The advance draft prepared at the Hague conference accepted the Anglo-American view, but allowed each contracting state to prohibit this form of bill for those which might be drawn payable, accepted, or guaranteed within its limits.<sup>35</sup> At the conference of 1912, it was decided to omit all direct reference to the subject, which remits the matter to the national legislation of the countries concerned.<sup>36</sup>

The arguments advanced against the recognition of such instruments were the following: (1) there is no demand for them; (2) they are less easy to discount than bills to order; (3) the creation of such bills of exchange might impair the privileges of the establishments which issue bank notes.<sup>37</sup> For those familiar with Anglo-American law, it is difficult to appreciate the force of the last argument. Certainly no such results have happened in England or in the United States. The other arguments reveal the typical attitude of continental legislation with regard to bills and notes. It manifests a tendency to tell bankers and business men what they can do instead of merely fixing limits beyond which, on grounds of policy, they are not allowed to go. The recognition of blank indorsements was not deemed a sufficient reason for allowing bills and notes to be made originally payable to bearer. The person executing the instrument having created order paper, it seemed inadmissible to permit its character to be changed by a subsequent holder. While an indorsement in blank may enable the bill or note payable to order to circulate as if payable to bearer, such an instrument differs, nevertheless, from one originally payable to

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Handelsrechts," I, p. 449; *Gruenhut*, "Wechselrecht," I, pp. 90-95. Words of negotiability ("or order") were required in all countries, excepting Scotland, until 1849, when the German Bills of Exchange Law recognized negotiability as a natural but non-essential quality of all bills and notes.

31. *Goldschmidt*, "Handbuch des Handelsrechts," I, p. 448.

32. *Savary*, "Le Parfait Négociant," I, pp. 214-216.

33. *Meyer*, I, pp. 116-117.

34. *Meyer*, I, p. 117; *Lyon-Caen & Renault*, "Traité de Droit Commercial," 4th ed., IV, p. 413.

35. See Art. 3, par. 4, of the Proposed Uniform Law and Art. 3 of the Convention, "Proceedings," 1910, pp. 34, 40.

36. "Proceedings," 1912, p. 275; "Actes," 1912, I, p. 79.

37. "Proceedings," 1910, p. 237; "Actes," 1910, p. 77.

bearer in that each holder has it within his power to prevent its further negotiation by mere delivery by filling out the blank indorsement, or by indorsing the bill or note specially.<sup>38</sup> In Anglo-American law the blank indorsement of an instrument payable to order converts it into one payable to bearer, where it is the only or last indorsement.<sup>39</sup> Where a blank indorsement is followed by a special indorsement, the instrument is payable to order, so that the indorsement of the special indorsee is required for its further negotiation.<sup>40</sup>

*Designation as Bill or Note.* The Uniform Law requires for the validity of a bill its designation as a bill of exchange in the body of the instrument.<sup>41</sup> According to Article 2 of the convention, however, any contracting state may prescribe that bills of exchange issued within its own territory, which do not bear the designation "bill of exchange," shall be valid, provided they contain the express indication that they are payable to order.

The requirement of the designation as a bill of exchange is of German origin and is of comparatively recent date.<sup>42</sup> It was introduced into German law at the end of the eighteenth century through the decisions of the courts which followed the views of text writers, and became finally established through the German Bills of Exchange Law of 1849. Since that time it has become a legal requisite for the validity of bills and notes in nearly all of the countries belonging to the German group.<sup>43</sup> Such a requirement furnishes, of course, a ready means to distinguish bills and notes from other similar instruments. The necessity of doing so was especially strong at the time of the origin of this requirement, when the remedy of imprisonment for debt was open to the holder of bills and notes in case of non-payment. Although im-

38. See *Kuntze*, "Lehre von Inhaberpapieren," p. 452; *Pappenheim*, "Begriff und Arten der Papiere auf Inhaber," p. 74; *Brunner*, in *Endemann's "Handbuch,"* II, pp. 193-194.

39. N. I. L. s. 9 (5); B. E. A. s. 8 (3).

40. Before the B. E. A., where a blank indorsement was followed by a special indorsement, the instrument remained payable to bearer:—*Smith v. Clarke*, 1794, Peake, 225. Prior to the N. I. L., the doctrine of *Smith v. Clarke* was followed in the United States. See *Curtis v. Sprague*, 51 Calif. 239; *Daniel*, "Negotiable Instruments Law," 5th ed., s. 696. According to Art. 40 of the N. I. L. "where an instrument, (originally?) payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery, but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement." Sect. 4 of the proposed amendments to the N. I. L. would repeal sect. 40, because of its apparent inconsistency with sect. 9, par. 5, N. I. L.

41. Art. 1. The same is true of promissory notes. See art. 79.

42. *Weiske's "Rechtslexikon,"* XIV, p. 215, note 39.

43. *Meyer*, I, p. 137; Art. 4 (1) German Bills of Exchange Law.

prisonment for debt has been generally abolished, bills and notes are still subject in many countries to special and rigorous rules. The procedure is often summary, and in some countries a bill or note is subject to execution as such. Moreover, in certain countries, Germany for example, the designation of a bill of exchange as such in the instrument, appears to be the only means by which it can be distinguished from a "commercial order." It was natural, therefore, that the German delegates at the Hague conferences should advocate the above requirement for the Uniform Law. They were opposed in this regard by the French delegates, who, if a change was to be made in their law, preferred the English system.<sup>44</sup> The English delegates also argued against the advisability of extending the formalism in bills and notes by the addition of another requirement. To the English bankers it appeared to be both "needless and vexatious."<sup>45</sup> The uncompromising attitude of the delegates made an agreement upon this subject impossible and led to the compromise contained in Article 2 of the convention, mentioned above.

*Other Formal Requisites.* The other formal requisites of a bill of exchange<sup>46</sup> under the Uniform Law are the following:

1. The name<sup>47</sup> of the drawee.<sup>48</sup>
2. An indication of the date of maturity. If the time for payment is not indicated, it is deemed payable at sight.<sup>49</sup>
3. Indication of place of payment. If none is indicated, the place specified beside the name of the drawee is deemed the place of payment.<sup>50</sup>
4. The name of the payee.<sup>51</sup>
5. An indication of the date of the place where the bill is issued.<sup>52</sup> Where a bill of exchange does not bear the name of the

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44. "Proceedings," 1910, pp. 81-82; "Actes," 1910, p. 29.

45. "Memorandum of Committee of Bills of Exchange," Institute of Bankers, reprinted in *Mr. Conant's* report, "Proceedings," 1912, p. 388.

46. The requirements for a note are similar: Art. 77.

47. Each contracting state has the power, so far as regards obligations assumed with reference to bills or notes within its own territory, to determine the manner of providing a substitute for signature, provided that a formal declaration inscribed on the bill or note verifies the intent of the person who should have signed. Art. 3, Convention.

48. Art. 1.

49. Arts. 1, 2.

50. Arts. 1, 2.

51. Art. 1.

52. The date appeared necessary: (1), to ascertain whether the stamp laws have been complied with; (2), to determine whether the drawer or maker had capacity to bind himself by a bill or note; (3), to ascertain the date of presentment in case of bills payable at sight or at a certain

place at which it was issued, it is deemed drawn at the place designated beside the place of the drawer.<sup>53</sup>

#### 6. Signature of the drawer.<sup>54</sup>

An instrument wanting in any of the formal aspects, as qualified above, is not a valid bill or note.<sup>55</sup>

It is obvious from the above provisions that the Uniform Law contains stricter formal requirements than does the Anglo-American Law. In England and the United States the validity of a bill or note is not affected by the fact that it is not dated,<sup>56</sup> or does not specify the place where it is drawn,<sup>57</sup> or does not specify the place where it is payable.<sup>58</sup> The name of the drawee and payee need not be given, it being sufficient that these parties are indicated in the instrument with reasonable certainty.<sup>59</sup> Again, a bill or note may be payable at a determinable future time.<sup>60</sup> Such an instrument is void under the Uniform Law, except in the case of bills payable at sight or a certain time after sight.<sup>61</sup>

*Additional Provisions or Clauses.* There are no provisions in the Uniform Law corresponding to Section 5 of the Negotiable Instruments Law, nor is there any general rule from which the effect of such stipulations upon the validity of the instrument can be ascertained. In view of the fact that the different continental countries have taken various attitudes with reference to such clauses,<sup>62</sup> different results will, no doubt, be reached under the Uniform Law if the question should arise.

time after sight. "Proceedings," 1910, p. 203; "Actes," 1910, p. 330. The practice of Anglo-American law which gives the holder the right to fill in the date (N. I. L. s. 13; B. E. A. s. 12) seemed too dangerous. "Proceedings," 1912, p. 398.

53. Arts. 1, 2.

54. Art. 1.

55. Art. 2, par. 1. Does this hold true also in the case where the name of the payee is omitted? There is no express provision on the point in the Uniform Act. The Central Committee at the conference of 1910 decided that they should be considered as bills of exchange in blank. "Proceedings," 1910, p. 203; "Actes," 1910, pp. 329-330.

56. N. I. L. s. 6 (1); B. E. A. s. 3 (4).

57. N. I. L. s. 6 (3); B. E. A. s. 3 (4) (c).

58. N. I. L. s. 6 (3); B. E. A. s. 3 (4) (c).

59. N. I. L. ss. 1 (5), 8; B. E. A. ss. 6 (1), 7 (1).

60. N. I. L. ss. 1, 4; B. E. A. ss. 3 (1), 11.

61. Arts. 1, 32. Another qualification is found in Art. 6 of the Convention, which reserves to the contracting states the right, within their own territory, to allow bills payable at a fair and to fix the date of their maturity.

62. Meyer, I, p. 198; *Lyon-Caen & Renault*, IV, pp. 86 et seq.; Staub, "Kommentar zur Allgemeinen Deutschen Wechselordnung," 3d ed., Art. 4, ss. 55 et seq.



*Delivery.* According to the Negotiable Instruments Law,<sup>63</sup> "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him is conclusively presumed."

The only express provision on the subject in the Uniform Law is found in Article 28, according to which an acceptor may cancel his acceptance before delivery of the bill, except where he cancelled the same after having informed the holder or any other signer in writing that he has accepted.<sup>64</sup> All other contracts on the instrument will probably be deemed likewise revocable until delivery.<sup>65</sup> From Article 15 of the Uniform Law it is clear that the want of delivery cannot be set up against the person who acquired title to the instrument in good faith and in the exercise of due care by an uninterrupted series of indorsements.

*Interpretation.* There is an express provision in the Uniform Law<sup>66</sup> that where the amount is written several times, either in words or in figures, in case of discrepancy the sum payable shall be the smaller sum. The Bills of Exchange Act and the Negotiable Instruments Law are silent on the subject.<sup>67</sup>

Article 8 of the Uniform Law makes a person, who adds to his signature on a bill of exchange words indicating that he signs in a representative capacity, personally liable on the bill if he was not duly authorized. This agrees with the law as laid down in the Negotiable Instruments Law,<sup>68</sup> which followed the German law in this regard.<sup>69</sup> Article 95 of the German Bills of Exchange Law imposes upon the agent the same liability as would have

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63. Sec. 16.

64. The B. E. A. provides likewise that an acceptance written on the bill is irrevocable after the drawee has given notice to or according to the directions of the person entitled to the bill that he has accepted. B. E. A. s. 21 (1).

65. For the antecedent law see *Meyer*, I, pp. 41-44; *Thaller*, pp. 637 et seq.; *Staub*, Art. 45, ss. 2 et seq.

66. Art. 6.

67. *Chalmers*, in his "Digest of the Law of Bills of Exchange," 6th edition, p. 29, says that this is the practice followed by bankers in England with respect to cheques.

68. Sec. 20.

69. Sect. 20 reads: "Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized." By necessary implication, the agent is liable on the instrument, if he was not duly authorized. In most jurisdictions in this country before the Negotiable Instruments Law such agent was not liable on the instrument, but only for breach of warranty of authority, See

rested upon the principal had the agent been authorized to bind him. He is under no liability, therefore, if the alleged principal would have had no capacity to bind himself, or if the statute of limitations would have barred an action against him. The Bills of Exchange Act re-enacts the common law.<sup>70</sup> The agent signing in a representative capacity without authority is not liable on the bill or note, but only in an action for breach of warranty of authority or for deceit. Most of the continental countries, likewise, limit the holders rights under these circumstances to an action for damages.<sup>71</sup>

## II. CONSIDERATION.

There are no rules relating to the subject of consideration in the Uniform Law. The notions of "holder for value" or "holder in due course" are equally unknown to the Uniform Law. The explanation is to be found in the fact that the law of bills of exchange, which had a continental origin, and was developed there upon the basis of the Roman law, was incorporated in England into the common law, and was thus compelled to adjust itself to the common law doctrine of consideration.<sup>72</sup> An application of all rules governing the question of consideration in the law of contracts would have defeated the very purposes for which negotiable bills and notes had been created. It became necessary, therefore, to indulge in presumptions and fictions and to make exceptions to the ordinary rules and with respect to the burden of proof.<sup>73</sup>

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*Bunker*, "Negotiable Instruments Law," s. 22, note. *Mr. Crawford's* first draft of the Negotiable Instruments Law embodied the old rule, but the Commissioners changed it deliberately in favor of the German rule. *Crawford*, "The Negotiable Instruments Law," s. 39, note; *McKeehan*, "The Negotiable Instruments Law," 41 American Law Register, N. S., pp. 462-463.

70. Sec. 26, par. 7.

71. *Meyer*, I, p. 68.

72. *Huffcut*, "The Law of Negotiable Instruments: Statutes, Cases and Authorities," p. 327, note, says: "The doctrine that a bill or note requires any consideration is of comparatively recent origin. It was unknown in the time of *Blackstone* (2 "Comm." 446), and early American cases are to be found in which it appears to be denied or doubted (*Bowers v. Hurd*, 10 Mass. 427; *Livingston v. Hastie*, 2 Cal. (N. Y.) 246). But the modern cases now uniformly hold that a bill or note executed and delivered as a gift is unenforceable for want of consideration."

73. Attention may be called to the following: An antecedent debt constitutes value. N. I. L. s. 25; B. E. A. s. 27 (1) (b). An accommodation party is liable to a holder for value. N. I. L. s. 29; B. E. A. s. 28. Every negotiable instrument is deemed *prima facie* to have been issued for valuable consideration (N. I. L. s. 24); and every person whose signature appears thereon to have become a party thereto for value. N. I. L. s. 24; B. E. A. s. 30 (1). Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time. N. I. L. s. 26; B. E. A. s. 27 (2).

On the continent, where the law of bills and notes continued to develop as a separate legal institution upon its original basis, it became a circulating medium free from the personal relationship existing between the parties, without having to encounter such difficulties as were created in England by its doctrine of consideration. While liability upon a bill or note in Anglo-American law rests today fundamentally upon the same footing as ordinary contracts, there is often a basic distinction between the two classes in continental countries. The theory has become prevalent in Germany that a unilateral promise to pay a certain sum may constitute in itself a contract, deriving its validity not from the transaction giving rise thereto, but exclusively from its form.<sup>74</sup> The rights of the holder, whether he be an immediate or a remote party, result in a clear and logical manner from this conception. It would seem that this view-point underlies also in general the Uniform Law. It should be observed; however, that whatever the divergencies in the fundamental notions underlying the continental and Anglo-American systems of bills and notes may be regarding the matter under discussion, they attain substantially the same result in the end.<sup>75</sup> The main difference lies in the method by which this result is reached. Under the continental system it is done in a direct and simple manner; under the Anglo-American, in a roundabout way by means of fictions and exceptions to the ordinary rules governing the subject of consideration.

### III. COVER. (*Provision.*)

In certain continental countries belonging to the French group the connection of a bill of exchange with the underlying business transaction is seen in the rules relating to cover.<sup>76</sup> According to the law of these countries, the drawer or his agent must provide cover, which exists when at the time of maturity the drawee owes to the drawer or to the party for whose account the bill of exchange is drawn an amount equal to the sum stipulated in the instrument. In case the drawer has not complied with his obligation, he will be liable even though the instrument was not duly presented and

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Absence or failure of consideration is not a defence against any person who is a holder in due course. (N. I. L. s. 28); who may not have given any consideration himself (N. I. L. s. 58; B. E. A. s. 29 (3)).

74. The theory was first propounded with great force by *Otto Baehr*, "Die Anerkennung als Verpflichtungsgrund," Cassel, 1855.

75. This is not true, of course, in all cases. A note, executed by A and delivered by him to C as a gift would probably be enforceable under the Uniform Law, but would not be, for want of consideration, according to English and American law.

76. *Meyer*, I, pp. 149-161.

protested. If he has furnished cover, he is not liable upon the dishonor of the bill. The acceptance of a bill of exchange raises the presumption that the drawee has received cover. Where a bill is drawn for accommodation, the want of cover has no effect upon the legal existence of the instrument. A holder in bad faith, however, can not recover in such a case.

Under French law the drawing and indorsement of a bill operates as an assignment of the funds in the hands of the drawee. Every holder has an action against a drawee who has received cover, and, in the event of the bankruptcy of the drawer, will be entitled to such funds.<sup>77</sup>

The above rules are plainly opposed to the German system where the bill of exchange stands on its own merits, independent of the relations that may exist between the drawer and drawee. They are also contrary to the law of England and to that of the United States.<sup>78</sup> At the Hague conference the French delegates insisted that the interested parties in France were satisfied with the French system and asked that it be not sacrificed in the interest of the unification of the law.<sup>79</sup> No agreement could be reached with regard to this matter. The convention expressly provides that all questions relating to cover shall be outside the scope of the Uniform Law and Convention.<sup>80</sup>

#### IV. NEGOTIATION.

Before the Uniform Law, the laws of the continental countries differed widely from each other and from Anglo-American law, on the subject of indorsements. In some, a very formal system prevailed. France, for example, allowed only special indorsements and required that they be made to order, that they be dated, and recite the value received.<sup>81</sup> An indorsement in blank would not pass title to the instrument, but would operate only as a power of attorney to collect the amount of the bill.<sup>82</sup> The Uniform Law, on

77. Articles 115-117, Code de Commerce; *Williamson*, pp. 26-48; *Lyon-Caen & Renault*, IV, pp. 159-175; *Thaller*, pp. 681-696.

78. N. I. L. s. 127; B. E. A. s. 53 (1). The Bills of Exchange Act makes an exception in favor of Scotland. It provides: "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time the bill is presented to the drawee." B. E. A. s. 53 (2).

79. "Proceedings," 1910, p. 92; "Actes," 1910, p. 40.

80. Art. 14. The same impossibility of reaching an agreement upon this point had been disclosed at the Congresses of Antwerp and Brussels in 1885 and 1888.

81. Art. 137, Code de Commerce.

82. Art. 138, Code de Commerce. Since the law of June 14, 1865, an indorsement in blank has been recognized in France as regards checks. *Lyon-Caen & Renault*, IV, p. 142.

the other hand, agrees in most respects with the provisions of the Anglo-American law.<sup>83</sup> A conditional indorsement, however, is not allowed, the condition being regarded as void.<sup>84</sup> Nor is an indorsement to bearer permitted.<sup>85</sup> As has been seen, an indorsement in blank does not convert an order instrument into one payable to bearer. When the blank indorsement is not filled out and is followed by a special indorsement, the last indorsee is presumed to have acquired the bill under an indorsement in blank.<sup>86</sup>

*Indorsement by way of Pledge.* The Uniform Law contains a form of indorsement which is permitted in France and some other countries, but is unknown to German and to Anglo-American law,—an indorsement by way of pledge.<sup>87</sup> Such an indorsement protects the indorser against a dishonest indorsee to whom he has pledged the instrument. If he indorsed the bill or note specially to such pledgee, or in blank, as he would otherwise be required to do, he might be unable to prove that the indorsement had been really by way of pledge. At the conference there was disagreement at first as to whether this form of indorsement should be dealt with by the Uniform Law, but it was decided in the end that it was preferable to admit it, and to determine its form and effect<sup>88</sup> while reserving to the national laws the privilege not to recognize it.<sup>89</sup> According to the Uniform Law, an indorsement by way of pledge confers upon its holder all the rights arising from the bill of exchange; but an indorsement by him shall be valid only as an indorsement in the capacity of an agent.<sup>90</sup> The parties liable cannot set up against the holder defenses based on their personal relations with the in-

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83. See Articles 10-12.

84. Art. 11. According to Sect. 39 of N. I. L.: "Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally." See also B. E. A. s. 33.

85. Art. 11.

86. Art. 15, par. 1.

87. An intention to indorse by way of pledge may be indicated by the stipulation, "value as security," "value as pledge," or any other words implying a pledge. Art. 18, par. 1.

88. See "Proceedings," 1910, p. 244; "Actes," 1910, p. 83.

89. This point is reserved by Art. 4 of the Convention, according to which each contracting state may prescribe that, in an indorsement made within its own territory, any statement implying a pledge shall be deemed void. The indorsement, therefore, is to be regarded as an unconditional one.

90. Art. 18, par. 1.

dorser, unless the indorsement has been given in pursuance of a fraudulent understanding.<sup>91</sup>

*Indorsement after Maturity.* An indorsement after maturity had a most diversified effect before the Uniform Law in the different countries. In some (e. g. in Holland)<sup>92</sup> such an indorsement was forbidden, so that a bill or note could only be assigned after maturity. In others, France, for example, the indorsee after maturity, obtained the same rights as an indorsee before maturity, an indorser after maturity being regarded as the drawer of a bill of exchange payable at sight.<sup>93</sup> In England and in the United States, likewise, an indorsement after maturity is equivalent to the drawing of a sight draft.<sup>94</sup> Under such an indorsement, no greater rights can be acquired than those possessed by the holder at the time of maturity.<sup>95</sup> Still other countries apply one rule to indorsements before and another rule to indorsements after the expiration of the time for protesting.<sup>96</sup> The Uniform Law<sup>97</sup> agrees with Anglo-American law, except that it applies these rules only to indorsements made after protest for non-payment, or after the expiration of the time fixed for drawing it. As the last holder may receive the instrument only in the afternoon before or even on the day of maturity, it seemed proper to allow him to negotiate the bill of exchange with all the effects attached to an indorsement prior to maturity, so long as the protest had not been drawn and the time for protest had not expired.<sup>98</sup>

#### V. GUARANTY OF BILLS AND NOTES. (*Aval*).

A guaranty of bills and notes by an *aval* form of guaranty is not uncommon in foreign countries, but is unknown to Anglo-American law. The nearest equivalent thereto is found in the section of the Bills of Exchange Act, which reads:

"Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."<sup>99</sup>

Before the Uniform Law, the laws recognizing *avals* differed a great deal both as to the form in which an *aval* must be given,

91. Art. 18, par. 2.

92. Art. 139, Commercial Code.

93. *Lyon-Caen & Renault*, IV, pp. 121-123.

94. N. I. L. s. 7; B. E. A. s. 10 (2).

95. See *Daniel*, s. 724a.

96. Art. 16, German Bills of Exchange Law; *Meyer*, I, pp. 201-205.

97. Art. 19.

98. "Proceedings," 1910, pp. 244-245; "Actes," 1910, p. 83.

99. Sec. 56.

and as to the relation existing between the principal debtor and the party giving the guaranty.<sup>100</sup> The Uniform Law provides<sup>101</sup> that it may be given by a third party or even by a signer of the bill. and that it may be given upon the bill of exchange or upon an allonge.<sup>102</sup> It shall be expressed by the words, "good for guaranty" (*bon pour aval*), or by equivalent words, signed by the giver of the guaranty. Except in the case of the signature of the drawee or of the drawer, it is deemed to be created by the mere signature of the giver of the guaranty, on the face of the bill of exchange.<sup>103</sup> The guaranty must indicate on whose behalf it is given. In default of such indication, it is deemed to be given for the drawer.<sup>104</sup> The giver of a guaranty is liable in the same manner as the party for whom the guaranty is given.<sup>105</sup> His engagement is valid even when the liability for which he has given a guaranty was invalid for any other cause than a defect of form.<sup>106</sup> Upon payment of bill of exchange, he has a right or recourse against the party whose signature he has guaranteed, and against the parties liable to the latter.<sup>107</sup>

#### VI. PRESENTMENT FOR ACCEPTANCE. ACCEPTANCE.

According to the Uniform Law, a bill may be presented for acceptance before the day of maturity, but not on the day of maturity or later.<sup>108</sup> Presentment must be made at the residence of the drawee even in the case of a bill of exchange payable in another place (domiciled bill).<sup>109</sup> The drawer and indorser may stipulate that a bill must be presented for acceptance with or without fixing a time limit. The indorser cannot do so, however, when the drawer has forbidden presentment for acceptance.<sup>110</sup> The drawer may for-

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100. *Meyer*, I, pp. 446-460.

101. Art. 29.

102. Art. 30, par. 7. According to Art. 5 of the Convention each contracting state has the power to prescribe that a guaranty may be given within its own territory by a separate document indicating the place where it was executed. This mode of giving an aval, which is sanctioned by Art. 142 of the French Code de Commerce, is used to avoid injury to the credit of the party in whose behalf the guaranty is given.

103. Art. 30, par. 3.

104. Art. 30, par. 4.

105. Art. 31, par. 1.

106. Art. 31, par. 2.

107. Art. 31, par. 3.

108. Art. 20. In N. I. L. s. 138 and B. E. A. s. 18 (2) it is expressly provided that a bill may be accepted when overdue.

109. Art. 20.

110. Art. 21, par. 4. This is based upon the consideration that inasmuch as the prohibition by the drawer is operative with respect to all holders of the instrument, an indorser should not be allowed to change the character of the instrument.

bid such presentment except in the case of a domiciled bill, or a bill payable at sight, or a certain time after sight.<sup>111</sup> He may also stipulate that presentment for acceptance shall not take place before a certain date.<sup>112</sup> In the absence of an express stipulation, presentment for acceptance is required only in the case of bills of exchange payable after sight.<sup>113</sup>

Greatly varying rules existed in regard to the time within which instruments payable after sight must be presented for acceptance. The Anglo-American group of countries prescribed a reasonable time;<sup>114</sup> the other countries had definite periods which differed greatly among themselves.<sup>115</sup> France, for example, required presentment within a period of three, four, six, or twelve months, according to certain geographical zones fixed by law.<sup>116</sup> Germany, on the other hand, prescribed the uniform time of two years.<sup>117</sup> The delegates at the Hague conference did not approve the Anglo-American rule because of its too great indefiniteness, and at the first conference fixed it at six months, with the privilege of the drawer to extend the time another six months.<sup>118</sup> Upon the representation of the English delegates, who informed the members of the conference that bills drawn upon England circulated not infrequently longer than twelve months before being presented for acceptance, the limitation was dropped. The Uniform Law provides that bills of exchange payable after sight must be presented for acceptance within six months after the date of issue, but that the drawer may extend such period or shorten it. The indorser may shorten the period, but not extend it.<sup>119</sup>

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111. Art. 21, par. 2. France and Austria favored this provision because, in their opinion, it is an excellent means for the discounting of outstanding debts. It seems that in France debtors are willing to have creditors draw upon them a bill payable on the day when the debt is due, but are opposed to bind themselves by an acceptance. In these cases it is customary to draw a bill prohibiting presentment for acceptance and to have the same discounted. "Proceedings," 1910, p. 245; "Actes," 1910, pp. 83-84.

112. Art. 21, par. 3.

113. Art. 22. According to N. I. L. s. 143 (3) and B. E. A. 39 (2), a bill must be presented also for acceptance when it is drawn payable elsewhere than at the residence or place of business of the drawee.

114. Sec. 144 of N. I. L. provides that bills required to be presented for acceptance must be presented for acceptance or be negotiated within a reasonable time. The B. E. A. s. 40 (1) has the same provision, but limits its application to bills payable after sight.

115. *Meyer*, I, pp. 239-250.

116. Art. 160, Code de Commerce.

117. Art. 19, German Bills of Exchange Law.

118. "Advance Draft," Art. 23; "Proceedings," 1910, p. 44; "Actes," 1910, p. 373.

119. Art. 22.



Anglo-American law gives to the drawee twenty-four hours in which to decide whether or not he will accept the bill.<sup>120</sup> In other countries, Germany,<sup>121</sup> for example, the drawee is allowed no time for deliberation. In still others he must decide the question upon the same day upon which presentment is made.<sup>122</sup> The Uniform Law provides that the drawee may ask that a second presentment be made to him on the day following the first;<sup>123</sup> but the holder is not bound to leave the bill with the drawee.<sup>124</sup> The question as to the consequences of a failure or a refusal on the part of the drawee to return the bill within the time allowed for deliberation cannot, therefore, ordinarily arise. Formerly the effect of a failure to return the bill within the time specified by law varied in the different countries. In some, such failure made the drawee liable for the damage caused to the holder (France).<sup>125</sup> In others, he was held liable as an acceptor.<sup>126</sup> In England the acceptance is deemed refused.<sup>127</sup> Under the Negotiable Instruments Law,<sup>128</sup> where the drawee refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.<sup>129</sup>

The only form of acceptance recognized by the Uniform Law is an acceptance upon the face of the bill itself.<sup>130</sup> The mere signa-

120. N. I. L. s. 136. The B. E. A. s. 142 speaks of "customary" time, but this is assumed to be twenty-four hours.

121. Art. 18, German Bills of Exchange Law; *Meyer*, I, p. 255.

122. *Meyer*, I, p. 255.

123. Art. 23. In order to remove all danger that, in case of recourse for nonacceptance, the defendant might falsely claim that the holder had not granted to the drawee time for deliberation, the interested parties are allowed to set up that the right has not been granted only if the fact is set forth in the protest. Art. 23, par. 2.

124. Art. 23, par. 1. The contrary appears to be true in the United States and England if the drawee should require the instrument to be delivered up. See *Chalmers*, p. 141.

125. Art. 125, Code de Commerce.

126. *Meyer*, I, p. 256.

127. B. E. A. s. 42.

128. Sec. 137.

129. A proposed amendment to Sec. 137 of N. I. L., prepared under the direction of the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws, recommends that instead of being deemed an acceptor, the drawee shall be held as a converter for the amount of the bill. Sect. 11 of Amendments.

130. Art. 24, par. 1. This requirement is imposed so that the acceptance might not be confused with an indorsement. In England and in the United States the acceptance need not be upon the face of the bill. B. E. A. s. 17 (2) (a). Under N. I. L. it need not appear even upon the bill. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, however, except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. (Sect.

ture of the drawee will suffice.<sup>131</sup> When the bill is payable at a certain time after sight, or when it must be presented for acceptance within a time fixed by virtue of a special stipulation, the acceptance must be dated as of the time when it was actually given, unless the holder requires that it be dated as of the day of the first presentment.<sup>132</sup> In default of the date, the holder, in order to preserve his right of recourse against the indorsers and against the drawer, must set forth this omission by a protest drawn within the legal time.<sup>133</sup> According to the American law<sup>134</sup> and English practice, a bill is accepted as of the day when it is presented for acceptance. When the acceptance is not dated, and the acceptor is not within reach, the holder may fill in the date. At the Hague conference the giving of such a right to the holder was deemed too dangerous.<sup>135</sup>

As in Anglo-American law, the acceptance must be absolute and unqualified. Partial acceptance is admitted, however, in derogation from this rule, and contrary to the law of England and of the United States,<sup>136</sup> for the benefit of the drawer and of the indorser.<sup>137</sup> Any other modification of the terms of the bill is equivalent to a refusal to accept. The acceptor is bound, however, according to the tenor of the acceptance.<sup>138</sup> The Uniform Law does not contain an express regulation as to the effect of taking a qualified acceptance with respect to the drawer and indorsers. Under the Negotiable Instruments Law<sup>139</sup> and the Bills of Exchange Act<sup>140</sup>

134). Even an unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person, who, on the faith thereof, receives the bill for value. N. I. L. s. 135.

131. Art. 24, par. 1.

132. Otherwise the convenience of the drawee would cause the holder to lose one day's interest.

133. Art. 24, par. 2.

134. N. I. L. s. 136.

135. "Memorandum on Uniform Law on Bills of Exchange" by Sir M. D. Chalmers and Mr. F. H. Jackson, "Proceedings," 1912, p. 401.

136. N. I. L. s. 141 (2); B. E. A. s. 19 (2) (b).

137. Art. 25, par. 1. The holder can protest only for the balance and in case of failure on the part of the drawee to pay at the time of maturity the holder will be put to the trouble and expense of instituting two separate proceedings against the drawer and indorsers. In order to enable the holder to bring these suits, Art. 50 provides that in case of recourse in consequence of a partial acceptance, the party who pays the sum for which the bill has not been accepted may require that this payment shall be set forth on the bill and that he shall be given a receipt therefor. The holder shall also furnish to him a certified copy of the bill and the protest.

138. Art. 25, par. 2. Whether an acceptor who has modified his acceptance shall be held according to the law of exchange or according to the civil law, is left to the courts. "Proceedings," 1910, pp. 224-225; "Actes," 1910, p. 350.

139. Sec. 142.

140. Sec. 44.

the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assented thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto. Under the Uniform Law, if a bill is payable at the residence of the drawee, he may indicate in the acceptance a different address in the same place where payment is to be made.<sup>141</sup> According to Anglo-American law, an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.<sup>142</sup> An acceptance to pay in a different city constitutes a qualified acceptance.<sup>143</sup>

Under the Uniform Law the drawer may sue the acceptor upon the bill and recover from him the amount to which any other party exercising recourse for non-payment is entitled.<sup>144</sup> This will give him, contrary to Anglo-American law,<sup>145</sup> a right to a commission, which, in the absence of agreement, is one-sixth of one per cent of the principal sum.

## VII. MATURITY.

The rules laid down in the Uniform Law regarding the calculation of maturity, days of grace, and the effect of holidays are in substantial accord with those of the Negotiable Instruments Law.<sup>146</sup> Article 17 of the Convention leaves the contracting states free to provide that certain business days shall be assimilated to legal holidays. Specific rules are laid down for the calculation of the maturity of bills of exchange, drawn from one country upon another, when the calendars differ.<sup>147</sup> Bills of exchange payable at sight must be presented for payment within the time fixed by law or

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141. Art. 26, par. 2.

142. N. I. L. ss. 140, 141 (3); B. E. A. s. 19 (2) (c).

143. *Niagara Dist. Bank v. Fairman etc. Mfg. Co.*, 31 Barb. (N. Y.) 403; *Daniel*, Sect. 1381; *Norton*, "Bills & Notes," 4th ed., pp. 123-124.

144. Art. 27.

145. See, *infra*, "Amount of Recovery."

146. The B. E. A. s. 14 (1) still allows days of grace. As regards holidays, the English law distinguishes between common law and bank holidays. When the last day of grace falls on a common law holiday, the maturity is the next preceding business day. If it falls on a bank holiday, it is due and payable on the succeeding business day.

147. Art. 36. The provisions of the Uniform Law are as follows: "When a bill of exchange is payable at a fixed date in a place whose calendar is different from that of the place of issue, the date of maturity shall be deemed to be fixed according to the calendar of the place of payment."

contract for the presentment for acceptance of bills payable at a certain time after sight.<sup>148</sup> The maturity of a bill of exchange payable at a certain time after sight shall be determined either by the date of the acceptance or by that of the protest. In the absence of protest, an acceptance which is not dated shall be deemed with regard to the acceptor to have been given on the last day allowed for presentment by law or contract.<sup>149</sup>

[To be continued.]

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"When a bill of exchange drawn between two places having different calendars shall be payable at a certain time after date, the date of issue shall be referred to the corresponding day of the calendar of the place of payment, and the maturity shall be fixed accordingly.

"The time for presentment of bills of exchange shall be calculated in accordance with the rules of the preceding paragraph.

"These rules shall not be applicable if a stipulation in the bill of exchange, or even the language of the document itself, indicates an intention to adopt different rules."

*Mr. Chalmers* states that these rules are in accord with English Mercantile practice. "Proceedings," 1912, p. 402.

148. Art. 33. See "Presentment for Acceptance," ante. The B. E. A. provides: "Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable." Sec. 45 (2). "Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged." Sec. 86 (1).

According to N. I. L. s. 71 presentment for payment will be sufficient, in the case of a bill of exchange, if it is made within a reasonable time after the last negotiation thereof. Sec. 7 of the Proposed Amendments to the Negotiable Instruments Law is drawn so as to bring the Negotiable Instruments Law on this point into harmony with the English rule.

149. Art. 34.

# THE ILLINOIS EDUCATIONAL CORPORATION UNDER SPECIAL CHARTER.

BY OLIVER A. HARKER.<sup>1</sup>

The state constitution of 1818 contained no provision whatever limiting or regulating corporate organization. For a period of thirty years the General Assembly was free to grant by special act, charters for all kinds of corporations, whether for pecuniary profit or not for pecuniary profit. During that time a great many eleemosynary corporations were created by special acts, among them one hundred and twenty-five educational institutions—colleges, academies and seminaries.

The constitution of 1848 prohibited the creation of corporations by special acts, except for municipal purposes and in cases where, in the judgment of the General Assembly, the objects of the corporation could not be attained under general laws. The first general law enacted thereunder for the incorporation of institutions of learning was approved January 26, 1849.<sup>2</sup> It provided that any five or more persons, desiring to establish such an institution, might file with the Secretary of State, and the recorder of the county in which it was proposed to establish the institution, a certificate or declaration in writing, stating the name by which it should be known, the number of trustees, the particular branches of literature and science to be taught, the number and designations of professorships, and whether the institution was to have the rank of college or university. Upon the filing of the certificate, properly acknowledged, the persons signing it became a corporate body, vested with power to use a common seal, confer degrees and do whatever was necessary for the government of the institution. The corporation was empowered in its corporate name to take by gift, devise or purchase, real and personal property, and devote it to the use of the institution in such manner as the trustees should deem most beneficial thereto, restricted only, in case of donation for particular purposes, to use the property in conformity with the conditions imposed by the donor or devisor. It was authorized to fill vacancies in the personnel of the body occurring from death, resignation or otherwise. Its trustees were required to file in the office of the secretary of state and in the office of the county recorder, an annual statement, containing an inventory of its property and

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2. L. 1849, p. 86.

liabilities, the number of students in attendance and full information concerning its condition and operation. The act provided that any corporation created under it, which should violate or fail to comply with any provision of the act, might be proceeded against by writ of *scire facias* for a forfeiture of its corporate rights and privileges.

Notwithstanding the broad and comprehensive scope of this general law, it did not have the effect to eliminate the creation of educational corporations by special act. The exception to the constitutional inhibition against creating corporations by special acts, "in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws," seems to have been quite liberally construed by the lawmakers. During the same session at which the general law of January 26, 1849, was passed, McDonough College was incorporated by special act, and the seventeenth General Assembly (1851), by thirteen separate special acts, granted corporate charters to thirteen different institutions of learning, among them Northwestern University. Until the adoption of the constitution of 1870, the General Assembly, because of the exception mentioned, continued to grant special charters to educational and other eleemosynary associations. In fact, most of the private corporations organized in the state prior to 1870 were created by special charter. The charters varied greatly in powers granted to the incorporators, and in other respects. There was general complaint of evils arising from granting exclusive privileges to corporations, especially as to those organized for profit, and when the constitutional convention assembled in that year, there was a determined sentiment to reverse the policy. Accordingly, the following provision was drafted and adopted:

"SEC. 1. No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

Of the several hundred eleemosynary corporations created by special charter, many had become extinct. Quite a number were in operation, however, and continued to exercise their corporate privileges under their special charters.

The first General Assembly after the adoption of the constitution enacted a general law providing for the creation of corporations, those for pecuniary profit and those not for pecuniary profit, through the office of the Secretary of State, and that law, with its

several amendments, is now in force. Acts have been passed from time to time in relation to corporations, continuing under special charters, some extending, others restricting their powers.

It sometimes occurs that the trustees of a special charter corporation having control of an educational or charitable institution find that the purposes for which the corporation was created cannot be carried out, or cannot be carried out in accordance with the terms of the charter. In such a case, a disposition of the property of the institutions may become quite embarrassing. Wherever the institution is under the care or patronage of a religious denomination, a way out of the difficulty is provided by an act approved May 13, 1903.<sup>3</sup> Under that act, the trustees may sell the property, and out of the proceeds pay the debts against the corporation. Out of any surplus, they shall return to the donors all sums given, under written conditions, requiring a return in case the purposes of the corporation cannot be carried out, and any balance remaining thereafter they shall deliver to the religious denomination under whose patronage the institution was conducted. The corporation is thereby dissolved.

But there is no statutory provision for such dissolution and disposition of property in case the corporation is not under the care or patronage of a religious denomination. In a situation like that mentioned, what may the trustees or directors constituting the corporate body do? There may be such a change in the conditions and circumstances which surrounded the institution at the time of its founding that the trustees find it impossible to conduct its affairs successfully. They see that further continuance will involve the institution in debt, and perhaps result in dissipation of its entire property. An opportunity is presented to merge with a successful corporation of a kindred nature, or to turn over its property to another engaged in the same line of endeavor but so situated that the property can be efficiently used in attaining the expressed purposes of the charter, and in conformity with the desires of donors. May they avail themselves of the opportunity and so dispose of the property? In the absence of restrictions in the charter, general statutes, or instruments of donation, the writer is of the opinion they may. All corporations capable of taking and holding property have the *jus disponendi* as fully as natural persons, except in so far as they are restrained by statute. Under this general power it has been repeatedly held a corporation, unless restrained by statute, may dispose of the whole of its corporate

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3. Hurd's Rev. Stat., 1913 ed., p. 568.

property for any lawful purpose. It is understood, of course, that power of disposition is always limited by conditions expressed in a devise or grant. It would seem to follow, then, that if there be no charter or statutory restrictions, and no reservation or condition to the contrary in the grant of a donor, the trustees may turn over the entire property of the corporation to another engaged in the same line of human endeavor but better prepared to fulfill the purposes of its creation. In such a corporation there are no stockholders to interpose objection. In fact, there are no persons financially concerned in the disposition except creditors; and when they are taken care of, no one has any just ground for complaint. Whether before assuming to exercise the power, the trustees should obtain the sanction of a court of equity, will be considered later on in this article.

The transfer of property held by a corporation in trust for educational purposes to another educational institution has been considered in several very interesting cases in other jurisdictions.

*Harvard College v. Society for Promoting Theological Education*,<sup>4</sup> was before the Supreme Court of Massachusetts in 1854. It was a bill in equity filed by the President and Fellows of Harvard College, praying for leave to transfer to the Society for Promoting Theological Education, or to such other trustees as the court might appoint, the funds held by the complainants in trust for the benefit of a divinity school attached to the college. There was no complaint in the bill that the charity had not been faithfully administered, or any suggestion that the objects of the charity had failed. The chief grounds assigned were that it had become apparent to the complainants that the college and theological school could not be conveniently managed by one and the same corporation; that the exercise of the trusts of the public charity for a divinity school was in high degree inconsistent with and injurious to the due execution of another and prior trust vested in them as trustees of the college; that the united management of the two institutions was also injurious to the divinity school, and that the trustees of the college could not so acceptably fulfill the intents and purposes of the donors of that charity as the same might be fulfilled by other trustees, and by a separate institution wholly disconnected from the college. It appeared from the evidence that there was not unanimity among those administering the affairs of the two institutions, either as to the connection or the method of conducting the divinity school. It was

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4. 3 Gray 280.



made clear by the testimony of witnesses of great intelligence, embracing gentlemen of various professions, and attached to various religious denominations, some of whom had been intimately connected with the management of Harvard College for years, that inconveniences and embarrassments had arisen in undertaking to conduct the divinity school in connection with the college, and that a separation would be highly useful to both. But the court held that a chancery court could not permit the withdrawal of funds given by individuals to the Corporation of Harvard College in trust for the promotion of theological education at the college and for the benefit of a divinity school attached to the College, and intrust them to an independent board of trustees, to be applied to the support of a divinity school not connected with the College. Quite a number of English cases were reviewed, and it is apparent from the opinion that the question was very carefully considered.

Within the same year, and at the time the Harvard College case was being considered, a similar case was presented to the South Carolina Court of Errors, *Ex Parte The Trustees of the Greenville Academies*.<sup>5</sup> "The Trustees of the Greenville Academies" was a South Carolina corporation, owning lands and buildings, secured by private donation, where schools were successfully maintained for a number of years. But the establishment of a male academy at Greenville, under the supervision of the Baptist Convention of South Carolina, with a staff of able and learned professors, so affected the attendance and patronage of the other institution as to make it apparent to a majority of the trustees that it could no longer be successfully conducted. To induce the Baptist Convention to locate a female seminary at Greenville, a majority of the trustees, over the objection and against the protest of a minority, proposed to transfer to the Baptist Convention the Academy lands "for the purpose of endowing a female college, on condition that the said Baptist Convention would forever keep up in the village of Greenville both a male and female school, where all the branches usually learned in a male and female academy shall be taught by competent and able teachers, and which shall be open to the whole community." A petition for authority to make the transfer was accordingly presented to the court. It was vigorously opposed by a minority of the trustees. The court granted the petition and ordered the transfer, with the condition that the trusts declared in the deeds of the donors be executed by the substituted trustees. On appeal,

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5. 7 S. C. Eq. 471.

the Court of Errors held that the transfer was legally allowable, but that an order of court allowing it was not necessary. The doctrine announced was in effect that if conditions were such that the academies could no longer be successfully conducted, the petitioners required no aid or authority from a court to make the transfer, but could make it on their own motion, and that the act of a majority of the trustees in the matter was the act of the corporation. But the court further held that it was better, as a matter of expediency and in furtherance of the objects of the trust, that the Baptist State Convention and the Trustees of the Greenville Academies should continue to exist as distinct corporations, and for that reason, and the additional one that court aid was not necessary to make the transfer of property, the decree was reversed and the petition dismissed.

The College of California, incorporated in 1855 as a College of Science and Letters, acquired by gift and purchase various tracts of land, and also received quite a number of donations of money from individuals. The trustees of the college desired to establish and carry on a university adequate to the necessities of the state, but finding, after struggling for several years, that they were unable to do so because of insufficient resources, and being desirous of inducing the state of California to establish a state university, in 1867 proposed to convey, and subsequently did convey, to the state, 160 acres of land for a site. The legislature, in 1868, passed an act creating and organizing the University of California, to be located upon the 160 acres of land mentioned. The regents of the university took immediate possession of the 160 acres, the present site of the University of California, and expended eight or nine thousand dollars in improving the land and preparing it for buildings. Some question arose as to the power of the trustees of the College of California to make the conveyance. The regents suspended any further expenditures and a suit to quiet title was commenced in the superior court. A judgment was rendered sustaining the action of the trustees of the College of California, and confirming the title in the state. The court held that, in the absence of any statutory authority for dissolution, the trustees had the right to dissolve and make such disposition of the property of the college as would enable the state to carry on a state university.<sup>6</sup> It should be observed that the trustees of the college questioned their power to convey the 160 acres of land. The action of the legislature in

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6. *People v. President and Trustees of College of California*. 38 Cal. 166.

establishing and locating the state university had had the effect largely to enhance the value of other real estate belonging to the college, and of real estate generally in and about Oakland. The suit was by no means *ex parte* in nature. The Supreme Court, in affirming the power, declared that it rested with the president and board of trustees of the college to decide whether public interest would be subserved by dissolving the corporation and devoting its property, after the payment of its debts, to the support of the state university, and that if they acted in good faith, their conveyances and transfers could not be disturbed. This opinion was delivered in 1869.

*State, ex rel. v. U. S. Grant University*,<sup>7</sup> is a more recent case—opinion rendered in 1905. The question was only incidentally involved, but the views expressed in the opinion harmonize with the holdings of the California and South Carolina courts. "The Grant Memorial University" was a Tennessee corporation, which had received its property through private donation. From lack of sufficient resources, it was unable to carry on its work satisfactorily. In 1892 it conveyed its property to the Freedman's Aid and Southern Educational Society, with the understanding that it would be conveyed by the grantee to the new U. S. Grant University, another educational corporation, whenever the latter should become financially able to carry on both schools. At the same time, the Grant Memorial University transferred its franchise, powers and privileges to the U. S. Grant University. Certain obligations were assumed at the time by the Freedman's Aid and Southern Educational Society and the U. S. Grant University, which it was afterwards claimed were not fulfilled. Accordingly, a bill was filed to enforce the contracts or, in the alternative, to cancel the contracts and have the property reconveyed and restored to the Grant Memorial University. The cause was assigned to the court of chancery appeals, and that court sustained a demurrer to the bill, holding that the Grant Memorial University was not entitled to a decree, either for the enforcement of the contracts or for a cancellation of them, and also that it was not entitled to a return of the property. On appeal, the Supreme Court of Tennessee held that where an educational corporation conveys and transfers its franchises, powers and privileges to another educational merger corporation, and conveys all its properties to an educational aid or auxiliary corporation, with the provision and agreement that the property is

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7. 115 Tenn. 240.

to be conveyed by the said auxiliary corporation to the educational merger corporation when it shall be financially able to operate and carry on the school, and upon its refunding to the auxiliary corporation the money expended in payment of its debts and delivers the possession of the property to the merger corporation, the conveying corporation, by such conveyance, worked a dissolution and terminated its existence, and could not maintain a suit for a return of the property. It seems to have been conceded by counsel on both sides, and so viewed by the court, that there was nothing wrong in the Grant Memorial University surrendering its property, franchises and privileges to another educational institution.

When circumstances and conditions are such as to justify the trustees of an educational corporation in turning over its equipment and assets to another corporation engaged in the same line of educational work, the writer is unable to see why they should be required to obtain first the sanction of a court of equity before making the transfer. Of course, their good faith in doing the act is always subject to review in a court of chancery, and there might be restrictions in grants, devises and other instruments conveying title, concerning which the construction of a court would be very desirable; but in a case where construction of an instrument is in nowise involved, and there are no rights of creditors or lienors involved, the trustees, acting in good faith, may proceed without first obtaining the order of a court.

# ILLINOIS LAW REVIEW

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## EDITORIAL NOTES

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### THE AMERICAN BAR ASSOCIATION MEETING

The American Bar Association held its thirty-ninth annual meeting at Chicago on August 30, 31 and September 1, 1916. It is the first time that the association has met in Chicago since 1889 when the attendance was only 158. Since then the association has grown from a few hundred members, mostly from the east and south, to over ten thousand members of the bar of the entire country.

The meetings of the various subsidiary and allied bodies of

the American Bar Association were held preceding and during the sessions of the American Bar Association. It is in these connected bodies that the most constructive work done in connection with the American Bar Association is accomplished, and the recommendations of the executive committee hereinafter discussed have in mind a further sectionalizing of the American Bar Association in order still to further facilitate its work, and make possible a larger participation upon the part of the members in the discussion upon the various reports.

Among the meetings so held were those of the National Conference of Commissioners on Uniform State Laws,<sup>1</sup> the American Institute of Criminal Law and Criminology, including the American Society of Military Law,<sup>1</sup> the Judicial Section, the Section of Legal Education, the Comparative Law Bureau, and the Section of Patent, Trade-mark, and Copyright Law.

This year there was also held a special conference called by the president of the American Bar Association and composed of representatives of the American Bar Association and delegates from state and local bar associations whose recommendations will be discussed later.

The Association of American Law Schools again failed this year to meet with the American Bar Association. We again call attention to the serious mistake being made by the law school teachers in failing to keep up their contact in this official way with the American Bar Association. Such a policy, pursued over a series of years, will result in their losing a large part of the influence they now have in the American Bar Association upon questions of legal education, and in placing that influence in men less worthy to exercise it. The legal educators of the country will exert an influence as large in the councils of the bar as their service to it warrants; and no professional pique should prevent them from being present at and participating in the great national association of the legal profession.<sup>2</sup>

The conference of bar association delegates was held on Monday preceding the meetings of the association, and fifty-one state and local bar associations were represented. The invitation issued by the president of the American Bar Association to the various state and local bar associations throughout the country, stated that

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1. [These meetings will be covered in subsequent issues of the *ILLINOIS LAW REVIEW*—Ed.]

2. See editorials, *IX ILLINOIS LAW REVIEW* 346, *X ILLINOIS LAW REVIEW* 214.

the conference was called "for the purpose of bringing about a closer relationship, official or otherwise, between the American Bar Association and such other associations." Two sessions of the conference were held and there was a general discussion of the need of a larger co-operation between the American Bar Association and the various state and local bar associations if the work of the national body was to be made fully effective. There was also a generally expressed sentiment that larger recognition should be given by the American Bar Association to the work being done in the various states by the local associations. The Illinois State Bar Association was represented in the conference by John H. Wigmore, of Northwestern University Law School and Nathan William MacChesney of the Chicago Bar, while the Chicago Bar Association was represented by Horace Kent Tenney and Edgar Bronson Tolman of the Chicago Bar.

The specific proposals before the conference for action emanated from two sources; coming from the executive committee of the American Bar Association itself, and those embodied in certain resolutions offered by the representatives of the Illinois State and the Chicago Bar Associations. The purpose of the amendments offered by the American Bar Association executive committee for the consideration of the conference was:

"To provide a referendum to the members of the association upon questions affecting the substance, or the administration of the law which are of immediate practical importance to the whole country; to make the president of each state bar association ex-officio a member of the general council, and to make the secretary of such association ex-officio member of the local council of the American Bar Association."

These amendments were all approved by the conference and were in turn approved by the executive committee of the American Bar Association, and recommended to the association for adoption, and were so adopted.

The resolutions offered by Mr. MacChesney upon behalf of the Illinois delegation were as follows:

"Resolved, that the constitution of the American Bar Association should be amended so as to embody the following provisions:

"1. [Membership]. After January 1, 1918, every applicant for membership shall be a member of his state bar association, if any exists; provided that this requirement shall not apply to a person who has been twenty years a member of the bar at that time.

"2. [Dues]. After January 1, 1918, the dues of the association shall be six dollars for members who are also members of their

state bar association, if any exists, and ten dollars for those who are not members of their state bar association.

"3. [Vice-president and local council]. After January 1, 1918, the vice-president and the members of the local council for each state shall be elected by the members of the American Bar Association for that state, meeting at the time and place of the annual meeting of their state bar association, if any.

"4. [General council]. After January 1, 1918, the members of the general council for each state shall be elected by the members of the American Bar Association from such state in the same manner as the vice-president and local council.

"5. [State associations]. In states where no recognized state bar association exists, the members of the American Bar Association for such state shall be called together by the vice-president for such state for the purpose of organizing such state association."

Of these resolutions the first, with reference to "membership," and the fifth with reference to "state associations" were approved by the conference; while the second, with reference to "dues," the third with reference to "vice-president and local council," and the fourth with reference to the "general council" were disapproved by the conference. Of the two recommendations approved by the conference, the executive committee of the American Bar Association approved that with reference to "state associations," and recommended it to the association for adoption, where it was duly adopted, but reported the proposed amendment with reference to "membership" to the association with the recommendation that it be not adopted, which recommendation, after some debate, was adopted by the association.

The executive committee in its report to the association at its first session held on Wednesday morning, August 30, also made certain other recommendations which it may be well to consider at this point. It stated:

"On the recommendation of the special committee appointed under the resolution of the association on September 2, 1913, reading as follows:

"Resolved, that a special committee of five members be appointed by the president of the association to consider (and report to the executive committee) what amendments to the constitution and by-laws would be desirable with a view to improving its order of business, and extending its influence in the profession, and in the community at large."

"The executive committee has resolved to recommend to the association certain amendments to the constitution and by-laws. The purpose of these amendments is to make the chairman of the general council a member ex-officio of the executive committee; to



increase the number of elected members of the executive committee from seven to eight; to abolish the committee on judicial administration and remedial procedure, and the committee on taxation; to make the committee to suggest remedies and propose laws regulating procedure, a standing committee; and to provide for nomination to election of members at annual meetings by the general council, in the absence of a *majority* of the local council of a state; and to provide that when committee reports have been printed in the journal, only an epitome thereof shall appear in the annual report."

The resolution above referred to was that introduced at the meeting in Montreal in 1913 and was the resolution proposed by Mr. MacChesney in which

"The executive committee inserted in the appointing resolution, when reporting it out, a clause (not in the original resolution) directing the committee on amendments to report to the executive committee, not to the association. This provision was unique in the history of our committees and it enabled the executive committee to hold in its own hands the power to suppress the report of the committee on amendments, whenever made."<sup>3</sup>

It will be noted that the executive committee bases the above recommendation upon the recommendation of the special committee appointed under the above resolution. Mr. Wigmore deserves great credit for the work done by that committee, and as stated by a member of the executive committee of the American Bar Association he has "rendered the association and the profession a great service by the thorough and efficient consideration which (he has) given to this matter." The executive committee does not, however, it will be noted, refer to the minority report of that special committee, which it refused to send out for the consideration of the association as a whole. The minority report contains many constructive proposals worthy of consideration by the association as a whole, and but for the public spirit of Mr. Wigmore, and some of his associates, these suppressed proposals would have been entirely lost. Denied official consideration, they have at least now been before the membership in pamphlet form, and have affected the feeling with reference to a need for change throughout the association. The proposals contain nothing radical. As outlined by Mr. Wigmore,

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3. The above quotation is from an open letter to the members of the American Bar Association by John H. Wigmore, of Northwestern University Law School, in May, 1916, protesting against the suppression of the minority report, in which he as chairman of the committee on amendments to the constitution and by-laws, had joined.

"They offer five general measures for improving the organization and methods of the association, by extending certain existing features. The first two measures aim to link up gradually the national association with the state association, by providing merely some personal touch between the members, without affecting the autonomy of either. The third aims to secure efficiency in the procedure at the annual meeting. The fourth aims to make more effective the results of the annual meeting's deliberations. The fifth aims to consolidate the management of the publications of the association.

"The Proposals are:

- "1. Membership. To add to the present qualifications a requirement that the applicant shall be a member of his state bar association.
- "2. Officers. (a) To make the local council in each state *elected by the state bar association*, and the *general council nominated* by the local council, and (b) to enlarge the local council to seven or ten in number, and the general council to two in number, from each state.
- "3. Conduct of Meetings. To extend the present section system, by expanding the sections to seven, merging with them most of the standing committees, and fully enlarging the membership of these committee-sections; these committee-sections to meet simultaneously (but not at the same hours as a general meeting), for the resolution of all matters concerning general law and practice; the business of each committee-section being prepared by a chairman and sub-committees, corresponding to the present standing committee.
- "4. Promotion of Measures. A new officer, the legislative chairman, to be given general supervision and responsibility for promoting all measures recommended by the committee-sections.
- "5. Publication. To substitute a publications secretary (virtually general editor) for the present publication committee."

The above summary contains the general features of the amendments proposed by the minority report from the special committee to which reference has been made above, and as a matter of fact was the basis of the recommendations of the executive committee mentioned heretofore as well as the rest of the resolutions approved by the conference. They also form the basis of certain other proposed amendments of the by-laws which the executive committee has formulated and presented to the association in its report, with the recommendation that it be ordered printed in the journal of the association and that it be referred to the next annual meeting for consideration by the association. This suggested by-law is as follows:

"The association shall be divided into the following commissions:

- I. Jurisprudence and Constitutional Law.
- II. Substantive, Customary, and Statute Law.
- III. Remedies and Procedure.
- IV. Education and Ethics.
- V. International and Comparative Law.

"Each commission to be composed of all members of the association who shall thirty days before the annual meeting notify the secretary of the association in writing of their wish to be assigned thereto. No member, however, to be assigned to more than two commissions. After a member is once assigned to a commission further notice from him to be unnecessary unless a change is desired. These commissions to hold separate sessions independently of each other immediately following the opening session of the association; and to devote themselves to the consideration of questions relevant to their respective divisions. Each commission to have a chairman and secretary, nominated by the general council and elected by the members of the commission present at the annual meeting. Each commission to have the power to appoint special committees to prepare specified material for consideration or to work out in detail the application of principles agreed upon by the commission, and to report to the commission not later than the next ensuing annual meeting.

"The judicial section and the section of legal education to be continued, with authority for joint sessions, when desired, of the judicial section and commission III and of the section of legal education and commission IV.

"The committees as now or hereafter constituted to be continued and to report to the appropriate commissions according to the nature of the subject reported upon.

"The sessions of the full association to be three in number:

(1) The opening session for the customary formal proceedings, reception of reports of administrative officers, and announcements of commission and section meetings.

(2) A business session solely for action on administrative reports, election of officers, and miscellaneous business.

(3) A deliberative session, with such adjournments as may be found necessary, for the consideration of reports of the several commissions and sections."

It will ultimately mean that the fight going on in the American Bar Association for a more representative organization, for a larger effectiveness in carrying out its recommendations, and for a more democratic control of its machinery of government, in which Mr. Walter George Smith of Philadelphia, and Dean John H. Wigmore of Chicago have been leaders, has made great progress. The executive committee is to be congratulated upon the extent of the recommendations which they have made; it is only to be regretted that

they were not made in such a way as to carry to the association as a whole the conviction that the executive committee are in sympathy with a more democratic organization; and in such a way as to allay, what the executive committee must know is widespread, criticism directed at some of the methods now pursued by the small group of men—the clique or machine—in control of the association.

Following a recommendation of the conference of bar association delegates, the executive committee also recommended that a

“Special committee be authorized to consider and report upon the expediency of creating in the American Bar Association a section or other instrumentality through which the activity of state and local associations may be aided in matters which call for communication, co-operation, or common action among them.”

This is undoubtedly a step in the right direction, but it is respectfully submitted that some of the suggestions of the minority report above referred to, tending to bring about closer co-operation between the American Bar Association and the various state associations would accomplish more in that direction than such a conference possibly can do, not to mention the still more radical course pursued by the American Medical Association which represents the most effective form of co-operation. Their plan provides that all members of the county medical societies are by virtue of that fact members of the state societies, while the American Medical Association is composed of all of the members of the various state societies. This plan would undoubtedly receive the serious consideration of the American Bar Association but for the fear, on the part of certain of its members that it would bring within the membership of the national association colored members of certain of the bar associations in the north, not to speak of the danger of women being elected to the American Bar Association under such a plan. Until that haunting fear ceases to be controlling, progress in that direction cannot be expected.

The section of legal education, of which Judge Henry Stockbridge of the Court of Appeals of Maryland was chairman, held three interesting and instructive sessions. The two sessions on the day preceding the meeting of the American Bar Association were largely devoted to the discussion of certain propositions submitted by the committee on standard rules for admission to the bar and were participated in, among others, by Charles L. McKeehan of Pennsylvania, William R. Vance of Minnesota, John C. Rose of Maryland, and Hollis R. Bailey of Massachusetts. At the session

on Wednesday, August 30, the annual address was delivered by the chairman of the section, and was followed by a paper on "The Law School and the Practicing Lawyer," by Professor Eldon R. James of Missouri.

It has been felt for some time by those active in this section that there should be closer co-operation between it and the Association of American Law Schools, as well as the committee on legal education of the association itself, and to bring this about, on the recommendation of the officers of the section, the executive committee of the American Bar Association recommended, and the association adopted, the following amendments of the by-laws, establishing a council of legal education for the section as follows:

"Amend by-law XIV (section of legal education) by adding thereto the following paragraph:

"There shall also be a council of legal education, composed of seven members, the functions of which shall be to prepare the program of the section of legal education for the ensuing meeting, and by correspondence and other practicable means to enlist and increase interest and participation in the sessions of the section. The chairman and the secretary of the section, the last two preceding ex-chairmen thereof (being respectively members of the association), and the chairman of the committee on legal education of the association shall be ex-officio members of the council; and the chairman of the section, at or as soon after the annual meeting as may be shall appoint as the other members of the council, a member of one of the law faculties represented in the association of American Law Schools and a member of one of the state boards of bar examiners, such appointed members to serve until the close of the annual meeting succeeding their appointment. The chairman shall also fill vacancies in the council."

It is hoped that this action will bring the section into more vital relation with the law schools of the country and with the boards of law examiners, as well as greatly increase the interest in the work which the section has been doing.

The meeting of the judicial section which opened with a dinner on the evening preceding the American Bar Association, was the most successful yet held. Its sessions were presided over by the chairman of the section, Honorable Orrin N. Carter, of the Supreme Court of Illinois, who also acted as toastmaster at the dinner. Closer sympathy with members of the bar on the part of the judiciary of the country as a means of humanizing the legal machinery of the nation was urged by former President Taft, Justice Mahlon Pitney, and president Elihu Root.

**President Root said:**

"It is important for a judge to know the law. It is important that he should know enough to find out what the law is in a particular case, but it is more important that he have the spirit of the law—the spirit which makes justice and liberty one.

"It is also important that he know life. A little humanizing must reach the judges as well as the lawyers. Too many of them feel a little withdrawn from the ordinary, and too dignified."

Among others who spoke at the dinner, were Chief Justice John B. Winslow of Wisconsin, former Solicitor-General Frederick W. Lehmann of Missouri, and John Barton Payne of Chicago.

The main business session of the judicial section held on the afternoon of the first day of the American bar meeting was opened with an address of welcome by Charles S. Cutting, president of the Chicago Bar Association, and followed by a brief address by Elihu Root, president of the American Bar Association. These were followed by addresses by Mahlon Pitney, Associate Justice of the United States Supreme Court, and John W. Davis of West Virginia, Solicitor-General of the United States.

The judicial section is now thoroughly established as a part of the work being done by the American Bar Association and a large share of the credit for this belongs to Judge Orrin N. Carter of the Illinois Supreme Court, who has acted as chairman of the section from its beginning. Credit for its inception belongs to Thomas W. Shelton of Virginia, who was chairman of the committee which originated the section.

In addition to the various allied bodies to which reference has been made above as having been held in connection with the American Bar Association, there was held in Chicago at the same time the meeting of the National Association of Attorneys-General. Among the speakers at this meeting was George W. Wickersham, former Attorney-General of the United States.<sup>4</sup>

At the first meeting of the American Bar Association, Wednesday, August 30, at 10 o'clock, Edward F. Dunne, the governor of Illinois, was presented to the chairman by Albert D. Early, president of the Illinois State Bar Association and gave the address of welcome. Governor Dunne was followed by Elihu Root of New York, president of the American Bar Association, who gave the presidential address on the subject of "Public Service by the Bar."

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4. [This address by Attorney-General Wickersham will appear in the next number of the ILLINOIS LAW REVIEW.—Ed.]

This address deserves careful perusal by all those who believe that the bar should fulfill a public duty as well as furnish a means of private livelihood. It should help too toward the abandonment of the Bourbon attitude of certain of the great law schools of the country, and a wider recognition and adoption of the work now being done by certain legal scholars, notably such as Ernst Freund of the University of Chicago, and William Draper Lewis of Pennsylvania, whose splendid, progressive service in the cause of the contemporary legislation is receiving widespread recognition, and is doing much to arouse the bar to its need of wider study of, and greater participation, in this important subject.

No law school which confines its instruction to the formal technical study of the law is doing its duty to the community, or is fitting its graduates for constructive service to the nation; and the practitioner who fails to get the larger point of view early in his career will live to feel a sense of futility in his professional life, and to resent the lack of opportunity which might have been his for really constructive work, if his attention had been directed that way by his legal training.

No one responsible for the courses of any of our leading law schools has perhaps grasped the significance of this demand more fully than has Dean Wigmore of Northwestern University, and the plans there, now maturing, to carry out this obligation to the Bar and to the community as a whole, are worthy of the study and emulation of other leaders of legal education in this country.

Mr. Root in opening his address, said:

"One of the most striking effects of the great war is the extraordinary increase of national efficiency which has followed the spur of necessity. All over Europe among the struggling nations the virile and simple virtues have emerged from beneath habits of selfish indifference. Industry, inventive energy, thrift, self-denial, acceptance of discipline, subordination of individual preferences to the general judgment, loyalty to ideals, devotion to country and willingness to make sacrifices for her sake have become general. A new gospel of patriotic service has replaced the cynicism of privilege and personal advantage."

After tracing the effect which this must necessarily have upon the United States, not alone along the lines of military organization and discipline, but in every phase of life, particularly upon a need of change of the individual attitude toward the government, he said,

"Too many of us have forgotten that not only eternal vigilance but eternal effort is the price of liberty. Our minds have been filled

with the assertion of our rights and we have thought little of our duties. The chief element of strength which the nations of Europe are acquiring is the spirit of their people, who have learned a new loyalty of devotion and sacrifice for their country. In a world where that spirit prevails the United States will slip back in the race unless we, too, have a new birth of loyalty and devotion."

He then commented upon the fact that national strength requires a spirit of solidarity among the people of the nation, that jealousy among the different sections of society in the country must be done away with if the forces of the nation are not to be wasted by internal controversy. Turning to particular needs of the legal profession he commented upon the great economic waste and said,

"There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause enormous waste of time on the part of witnesses and jury panels and parties. The ease with which admission to the bar is secured in many jurisdictions and the attraction of a career which affords a living without manual labor has crowded the bar with more lawyers than are necessary to do the business. Of the 114,000 lawyers in the United States according to the census of 1910, a very considerable part are not needed for the due administration of justice."

Continuing, he said:

"We perform indeed a necessary service for the community; and to the extent of that necessary service we contribute towards the production of all wealth and the effectiveness of all energy in the community, and we take toll, rightly, from all the property and business in the community for the service. Superfluous lawyers, however, beyond the number necessary to do the law business of the country, are mere pensioners and drags upon the community and upon all sound economic principles ought to be set to some other useful work."

Mr. Root then commented upon the defects in the American administration of justice, stating that the underlying cause of the defective administration is that we proceed upon a false assumption as to our true relation to judicial proceedings, and said,

"Unconsciously, we all treat the business of administering justice as something to be done for private benefit instead of treating it primarily as something to be done for the public service. The administration of law is affected by that same general attitude . . . in which citizens think about what they are going to get out of their country instead of thinking what they can contribute to their country."



He then showed how this attitude was the natural outgrowth of our political system with its highly developed accent upon individual rights and urged the necessity of larger groups of men who would consider the interests of the community first. He then dwelt upon the necessity of adequate education and training for the bar, calling attention to the great loss of time upon the part of the courts due to badly trained and inefficient lawyers and said,

"There is another evil arising from defective education. These half-trained practitioners have had little or no opportunity to become imbued with the true spirit of the profession. That is not the spirit of mere controversy, of mere gain, of mere individual success. To the student of the law, there come from Hortensius, and Cicero, and Malesherbes, and De Seze, and Erskine, and Adams, from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning, and subtle, and technical, or seeking unfair advantage—a bar jealous of the honor of the profession and proud of its high calling for the maintenance of justice—that we must look for the effective administration of the law."

Continuing, he said:

"The rights of the people of the United States to have an effective administration of the law require that the standards of the best law schools shall be applied to determine the right to membership in the bar . . ."

And that

"No untrained lawyer is entitled to impair the efficiency of the great and costly machinery which the people of the country provide, not for the benefit of lawyers but for the administration of the law."

Mr. Root then traced the reasons for the failure of the bar to realize fully its public duty, commented upon the tendency of legislation with reference to the limitation of the authority of the bench as indicating the same point of view, and particularly upon the provisions found in many states which prohibit the judge from expressing any opinion to the jury upon questions of fact, and that many of the evil results of the absurdly technical procedure which obtains in many states really come from intolerance of judicial control over the business of the courts. He said,

"A clearer recognition of the old idea that the state itself has an interest in judicial procedure for the promotion of justice, and a more complete and unrestricted control by the court over its own

procedure would tend greatly to make the administration of justice more prompt, inexpensive and effective; and this recognition must come from the bar itself."

Mr. Root then traced the development of the common law and the need that the bar should think, not merely in terms of law, but in terms of jurisprudence; commented upon the changes in industrial conditions making necessary a new view of the law as a whole, and upon the creation and development of administrative law with its change of machinery, remedies and necessary safeguards from the old methods of regulation by specific statutes enforced by the courts; and dwelt upon the fact that the development of the law and institutions does not follow the line of pure reason or demands of scientific method, but is determined by the needs and conditions of the people, out of which it grows from day to day; and called attention to the danger of "swift and easy reform which may relieve (the community) of the burdensome task of self control by the exercise of compulsion on someone else."

Mr. Root then traced the development of national power and spoke of the tendency to break down the carefully adjusted distributive powers between the national and state governments.<sup>5</sup> He said:

"The central principle of our system of government is in the proposition that every man has a right to full and complete individual liberty, limited only by the equal liberty of every other man. From that right all others are deduced; the right to life, to property, to the pursuit of happiness, are its corollaries. Our whole system of law is in its essence only the enforcement of the reciprocal limitations of individual liberty. It is a compulsion upon me to limit my liberty by yours and upon you to limit your liberty by mine. The justification of all laws and customs which constrain human conduct is that they are necessary and appropriate for the preservation of the liberty of others. Whatever law passes beyond that limit and seeks to impose upon the individual the ideas of others as to what his conduct should be, whether to subserve the interests of others or to conform to their prejudices or to their ideas of propriety or wisdom, even though those others may constitute an overwhelming majority of the whole community, is a violation of the principles upon which our government was formed; is not the just exercise of governmental power, but is essential tyranny."

He then pointed out the part which the bar must play in the great work of the coming years in making the necessary readjustments and closed with a plea to the lawyers of the United States

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5. See Address, "Uniform State Laws—A Means to Efficiency Consistent with Democracy," by Nathan William MacChesney, Illinois State Bar Association Reports, 1916.

"to enlarge (the) membership (of the American Bar Association), to improve its procedure, to increase its scope and efficiency, to strengthen its authority and its appeal in the real life of our time—these are steps by which the lawyers of all the states may rise to the high level of patriotic duty and a dignity of service worthy of a true American bar."

The address of the president was followed by the reports of the treasurer, of the executive committee, which has been commented upon above, and of the secretary, which showed that seven hundred and ninety-three members had been elected to membership in the association since the last annual meeting.

The second session of the association, held in the evening, was presided over by a former president of the association, Frank B. Kellogg of Minnesota, and was addressed by Lindley M. Garrison, former Secretary of War.

The recommendation of the executive committee above referred to, that the resolution (requiring after January 1, 1918 membership in the state bar associations as a prerequisite to membership in the American Bar Association), presented by the representatives of the Illinois State Bar Association to the conference of bar association delegates, and recommended by them, but reported by the executive committee to the association with the recommendation that it be not adopted, was called up as a special order of business following the address by Mr. Garrison. It was debated at length. Among those taking part in the discussion were Nathan William MacChesney of Illinois, in favor of the resolution, and Chief Justice Charles N. Potter of Wyoming, against it. The recommendation of the executive committee was sustained.

The evening session was followed by a reception in the galleries of the Art Institute given by the Illinois State Bar Association and the Chicago Bar Association to president and Mrs. Root, and the members, and guests of the American Bar Association. The setting for the reception recalled the brilliant receptions of the association held at Montreal in 1913 in the Art Gallery there, and in Washington in 1914 in the Pan American Union Building by the Supreme Court of the United States.

The third session, presided over by a former president of the association, Frederick W. Lehmann of Missouri, was devoted to the reports of standing and special committees.<sup>6</sup>

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6. See 2 American Bar Association Journal, 381.

Some of the more important committee reports considered and adopted were the following:

The committee on jurisprudence and law reform, by its chairman, William L. Putnam, again referred to the Keedy bill to regulate expert testimony,<sup>7</sup> but recommended that consideration be postponed until the next annual meeting.

The committee on commerce, trade and commercial law, by its chairman, Francis B. James, reviewed the history of national legislation on bills of lading and called attention to the resolution adopted at the last annual meeting of the association asking the executive committee to authorize the committee on commercial law to employ a draftsman to prepare a draft of a bill codifying the law covering the reciprocal rights, duties, and obligations of common carriers and shippers in interstate and foreign commerce, upon which the executive committee of the association, however, acted adversely.

It dealt with the creation of the Federal Trade Commission and suggested it might be well for it to conduct *ex parte* hearings and render opinions thereon, as is now done by the Interstate Commerce Commission.

The committee also listed and commented upon the various bills introduced in Congress during the last session intended to repeal the bankruptcy act, and, consistent with the settled policy of the American Bar Association, recommended that all such bills should be defeated.

The committee also called attention to a proposed amendment of section 17 of the bankruptcy act, known as Danforth H. R. 12195, originally introduced on February 24, 1916, at the first session of the 64th Congress. The report of the House Committee, made March 6, 1916, as House Report No. 299, 64th Congress, contained this amendment which provided for denial of discharge to a bankrupt from liability incurred "for breach of promise of marriage accompanied by seduction." The committee recommended the passage of this bill.

The committee on international law, by its chairman, Charles Noble Gregory, submitted a table of the principal international events occurring since the last annual meeting of the association and expressed,

"Its earnest hope that the efforts of the United States government to maintain in full force the pre-existing rules of international law for the protection of the rights of non-combatants, and of the

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7. See X ILLINOIS LAW REVIEW, 218.

persons, and the property of neutrals upon the high seas may be crowned with success, and that these rights, so important for the welfare of mankind, may remain assured and unabridged. It welcomes the responsible utterances of all parties to the great European war recognizing and acknowledging such rights, and congratulates our government on having obtained such definite declarations."

The Committee also urged,

"That the rules of international justice and humanity established by custom or agreement ought not to be omitted in the requirements for legal degrees or for admission to practice at the bar;"

and recommended that it should be required in the courses of the law schools and as a required topic in examinations for admission to the bar.

The committee on patent, trademark and copyright law, by Robert H. Parkinson, its chairman, reviewed its services in bringing to the attention of the legislators such considerations as might aid them in determining the merit or demerit of the bills before them and in contributing, so far as possible, toward informing them concerning the practical effect of those which the committee regarded as especially mischievous.

The committee called attention to an amendment proposed to the Trademark Act, known as H. R. 380, introduced December 6, 1915, and S. 666, introduced December 7, 1915, which would insert in the list of marks prohibited from registration in paragraph (b), Section 5, after "emblem"—

"Or the name of any church, religious denomination of society, or the name by which any church, religious denomination or society is commonly known or called,"

and recommended its enactment. This seems only fair and decent, as no commercial organization has a right to exploit the patriotic or religious sentiments of the people for its own selfish commercial aggrandizement.

The committee also listed the various bills of special interest in that field and made various recommendations with reference thereto.

The committee on insurance law reported upon the preparation of a proposed code of laws regulating insurance which had been prepared under a resolution of the association passed in 1913 to co-operate with the Senate and House Committees of Congress on the District of Columbia in formulating a model insurance code for the District of Columbia, with a view that such code, when approved

by the association and enacted into law by Congress, might be adopted by the several states.

It would seem that this method of handling the subject of uniform insurance legislation is an undesirable one, as the subject could be better handled with a larger chance of successful passage in the various states if prepared under the direction of and given endorsement by the National Conference of Commissioners on Uniform State Laws.

The committee stated that it had completed to its satisfaction most of the provisions of the proposed code, but the provisions regulating mutual fire insurance and those regulating inter-insurance and some other provisions have not been completed, and recommended that it be authorized to continue the work of the proposed model code for the regulation of insurance in the District of Columbia, in accordance with the above resolution.

The committee on uniform state laws, by Charles Thaddeus Terry, its chairman and a former president of the National Conference of Commissioners on Uniform State Laws, dwelt upon the care with which the various uniform acts had been prepared under the direction of the National Conference of Commissioners on Uniform State Laws and the respect to which the recommendations of the committee, which were based upon the work of the national conference, were therefore entitled.

The committee traced some of the achievements in this field, called attention to its great importance, and recommended a thoroughgoing approval of the work being done, and the contribution of the utmost influence and counsel in the matter, and asked the support of the association by the adoption of the following resolution:

"RESOLVED, That the uniform land registration act, the uniform foreign probate act, and the uniform flag act, having been heretofore approved and recommended by the (National) Conference of Commissioners on Uniform State Laws, be, and the same are, hereby approved by this body, and recommended to the legislatures of the various states for enactment into law."

Copies of the above acts were attached to the report.<sup>8</sup>

The committee on professional ethics, by Charles A. Boston, its chairman, gave an interesting and illuminating review of the

8. For full discussion of this subject see president's address, Illinois State Bar Association, June 1, 1916, on "Uniform State Laws—A Means to Efficiency Consistent with Democracy," by Nathan William MacChesney. See also III ILLINOIS LAW REVIEW 512, V ILLINOIS LAW REVIEW 521, VIII ILLINOIS LAW REVIEW 518.

progress (which is not entirely satisfactory to the committee) being made in the enforcement of higher standards at the bar. There appear to be approximately six hundred and seventy-five state and local bar associations in the United States and its dependencies from which the committee endeavored to get some co-operation in its work, but out of this number it only received replies from two hundred and twenty-two. The committee states,

"The value of legal ethics lies not so much in conventional etiquette, whatever the practical advantages in that respect may be, but in the public necessity which should and does demand that the bar be composed of men who do not abuse their office and privileges to the great detriment of the due administration of justice."

The committee also called attention to the resolution passed by the National Credit Men's Association asking for a more vigorous prosecution of dishonest attorneys, and gave the details of the splendid work being done by the association of the bar of the state of New York and the New York County Lawyers' Association. We would suggest that similar credit might be given to the Chicago Bar Association, which is likewise doing very efficient work in this field. It also comments upon the growing interest in the canons of professional ethics as published, and upon their use as a basis for examinations in legal ethics. We would suggest that the committee might well give consideration to making the canons more available, and for this purpose have attached to them a proper topical index as has been done by the Illinois State Bar Association, which publishes each year the American Bar Association canons of ethics in its annual volume, together with a topical index<sup>9</sup> analyzing them for the use of the reader. The so-called topical index originally appearing in connection with the American Bar Association canons was in fact a mere table of contents and is not satisfactory for teaching purposes.

The committee on noteworthy changes in statute law, by Thomas I. Parkinson, its chairman, presented an elaborate and valuable report which should be read and studied with care by every lawyer who is desirous of keeping in touch with the growth of statute law in this country. The committee calls attention to the fact that in this, an off-legislative year, in which only eleven legislatures held regular sessions, there were introduced at regular sessions alone nearly fifteen thousand bills, while more than ten thousand bills

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9. Prepared by Nathan William MacChesney for the University of Illinois College of Law.

had been introduced in the present Congress. The committee, however, cautions against hasty generalization on this subject by saying,

"We must not, however, be misled by mere numbers, for some of these bills are duplicates or relate to the same subject, a very large number provide detailed and unimportant amendments to existing law, and not a few are nebulous proposals intended rather as educational propaganda for reforms barely on the horizon than as possible statutes."<sup>10</sup>

Among the reports of the special committees presented and adopted were the following:

The committee on uniform judicial procedure by Thomas W. Shelton, its chairman, reported that the sentiment in favor of the modernization and uniformity of the procedure of the courts and of judicial procedure had crystallized into a fixed and organized campaign, and stated that,

"The legislature of the state of Virginia (had) unanimously vested in the Supreme Court of Appeals of that state the necessary power to prepare and put into effect a system of rules in place of the common law practice modified by statute that had been in vogue a hundred years. The court will, it is hoped, adopt the proposed new federal rules as soon as they are prepared under proper authority from Congress."

The committee also reported that in compliance with the resolution of the association it had presented briefs and arguments to the special committee of the Senate having under consideration "Judicial Code No. 2," that the objectionable features of depriving the judge of the power of directing a verdict in suitable cases and of "summing up" the evidence were eliminated, and that the name had been changed to "Practice Code." The power of the Supreme Court remains the same as it was under Section 914, R. S.

The committee renewed its recommendation that the legislatures of the various states be requested to appropriate \$150 per annum for the traveling expenses of a judicial representative to the annual meeting of the judicial section.

The committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation, by Everett P. Wheeler, its chairman, reviewed the history of its reformed procedure bill, traced the development of practice in jury trials and presented a series of resolutions with reference to the proposed

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10. For valuable discussion on this subject see address by Prof. Edward H. Warren of the Harvard Law School, before the Illinois State Bar Association, December 29, 1915, on the "Welter of Decisions," *X ILL. LAW REVIEW*, 472.



practice code (S. 1412) with reference to this reformed procedure bill, which is as follows,

"No judgment shall be set aside or reversed, nor shall a new trial be granted by any court of the United States in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire cause, it shall appear that the error complained of has injuriously affected the substantial rights of the parties."

The committee called attention to the fact that the judicial committee of the Senate had voted to amend the bill in a manner that would practically destroy its effect, and recommended for adoption a resolution "that it be instructed to take such steps as it shall deem expedient to secure the passage of the bill heretofore recommended by the association as the same has been amended in the House of Representatives, in the form specified in the schedule annexed to this report," which is the form given above.

A spirited debate took place upon this recommendation and there was considerable opposition to it; among those speaking against it being Merritt Starr of the Chicago bar, who objected to having criminal cases covered by the statute. The president of the association, Mr. Root, came to the defense of the committee, however, and the recommendation of the committee sustaining the action of the association heretofore taken was sustained. The speech of Mr. Root in defense of the committee report was one of the finest examples of extemporaneous debate ever heard upon the floor.

The committee to oppose judicial recall, by Rome G. Brown, its chairman, reported upon its work during the last year, and stated,

"It seems now reasonably certain that no state which has not already adopted a constitutional amendment providing for judicial recall, will do so."

The report contains a list of all the constitutional amendments providing for judicial recall, either the recall of judges or of judicial decisions, or of both now in force, as follows:

Oregon.—Recall of judges. Constitution, Article II, Sec. 18. Adopted in 1908 under initiative by the people.

California.—Recall of judges. Constitution, Article XXIII. Adopted in 1911.

Colorado.—Recall of judges and recall of judicial decisions.

Constitution, New Article XXI, and amendment to Article VI, Sec.

1. Adopted in 1912 under initiative by the people.

Arizona.—Recall of judges. Constitution, Article VIII, Sec. 1. Adopted in 1912.

Nevada.—Recall of judges. Constitution, Article II, Sec. 9. Adopted in 1912. Facilitating legislation adopted in 1913—Chapter 258, Laws 1913.

Kansas.—Recall of judges. Constitution, Article IV, Secs. 3, 4, 5. Adopted in 1914.

The committee again deals with the plans of the American Judicature Society for the re-organization of the courts and the selection of judges. It seems to be needlessly alarmed at certain proposals made by that society, stating,

"That the plan suggested involves the retirement of a judge by the arbitrary vote of the electorate, and that, too, within the period for which such judge has been selected. Such use of the recall cannot be likened to the privilege of re-election of a judge after the latter's term has expired."

As we have heretofore pointed out, the form in which the proposal was put forth was an unhappy one<sup>11</sup> but nevertheless it would prolong the average tenures of elected judges rather than shorten them, and at the same time remove many of the objections, not only in the popular mind, but among the best informed men of the profession, to the appointment of judges for a life term.<sup>12</sup> However, the American Judicature Society, in conference with the committee, has wisely decided to amend the form of its proposal so that it will hereafter provide for the judge being selected for a definite term, at the end of which term his name will be submitted in accordance with the plan of the society for a vote of the electorate, as to whether or not he shall be reelected or reappointed as the case may be. This would represent a great advance over the system at present in vogue, and it is to be hoped that the committee will give the plan, now that its form has met the objections raised, its hearty approval and support.

The report of the committee on legislative drafting, by William Draper Lewis, its chairman, of which Ernst Freund of Chicago is a member, reported that under the resolution of last year it was directed to continue to prepare for submission to the association a legislative manual, which should contain a selection of suggestions for drafting laws and model clauses for constantly recurring pro-

11. See X ILLINOIS LAW REVIEW, 220.

12. See Comment on Address of Joseph W. Bailey, Former Senator from Texas, on the "American Judiciary," X ILLINOIS LAW REVIEW, 217.

visions and problems, and to co-operate with other organizations in the preparation of such a manual, and that two topics had been completed during the year, namely, "Provisions for Licensing or Certification," and "Enforcement."

The committee also reported that recognizing the fact that if legislators require assistance in the preparation of the statutes enacted by them, the citizen who initiates legislation in those states where the initiative is in operation has still greater need for such assistance. California has imposed upon the chief of the legislative counsel bureau the duty of assisting in the preparation of any initiative measure when requested to do so by twenty-five electors proposing it.<sup>13</sup>

The committee was directed to continue to prepare for submission to the association a standard manual of legislation and authorized to continue any research pertaining to the improvement of our statutory law.

The committee on reports and digests, by Thomas H. Reynolds, its chairman, reported that there were 18,000 opinions of courts of last resort handed down in the various states in 1914, averaging about two thousand words to the opinion, and making approximately two hundred and ten volumes of reports for the year, and quoted the resolution creating the committee,

"That the increasing volume of the reported cases is a burden for which some relief must be found, both in the selection of the opinions that are reported and in greater brevity in the opinions themselves."<sup>14</sup>

The committee calls attention to one of the grave dangers of the situation by saying,

"The volume of law in most of the states is now so great that it is becoming less necessary and much less frequent to cite the opinions of courts of other states, and, as a result, there is a tendency to build up in each state a system of judicial law without reference to the decisions in other states. We regard this tendency as an evil one and fraught with dangerous possibilities. Every effort of our association should be exerted toward bringing into complete harmony the decisions of all the states, so that there may be, so far as possible, uniformity in the law, for the whole country, and not different and conflicting general laws in the different states."

The committee goes on to say,

"It is suggested that the case system of legal education is re-

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13. Laws, chap. 141, 1915.

14. For discussion of this subject, see Prof. Warren's article (note 9 *supra*), X ILLINOIS LAW REVIEW, 472.

sponsible for the eager search for a precedent in point, and when, in the course of time, lawyers thus trained become judges of courts of last resort, the opinions will reflect more and more a 'hide-bound' adherence to a precedent, while others express the view that the result will be a keener analysis and broader horizon tending to develop a more discerning use of precedents because of a better understanding of them."

The committee then made certain recommendations with reference to the Federal Reporter and as to what opinions should be published.

At the fourth session held in the evening, Senator Sutherland of Utah read an address prepared by Senator William E. Borah of Idaho, who was detained because of important business in the Senate, on the subject of "Lawyers and the Public." Senator Borah said,

"The call of America today is less for a change of institutions than for a change as to the vigilance and civic activities of individual citizenship.

"If there be evils menacing our institutions, if these evils seem to strengthen year by year, the law-makers and administrators of the law are not the only sinners. This is our government. We are its custodians.

"We are bound, then, in private life to be alert every hour to exert our influence in every reasonable way for its betterment or protection. Behind the officers who seek to know the right and to do it there should be a well organized and well sustained public opinion that they may not make their fight in vain."

Continuing, he said,

"I do not believe that a lawyer has any more right, as a matter of correct public service, to hold a retainer while writing law in the public interest and that a law which might affect his client adversely, than has a judge to hold retainers from those whose interests may be affected by the decisions which he renders or the judgment which he signs.

"A member of Congress is in an indefensible position who is called upon to legislate concerning those matters in which his clients may have an interest and which may concern them vitally."

He closed by saying,

"Next to the virtue and worth of the law that is written is the faith of the people in the law and in those who have made it and are to administer it."<sup>15</sup>

The final session of the association was presided over by Albert D. Early, the president of the Illinois State Bar Association,

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15. For a commendatory article on this address and the need of patriotism and higher ethics in the profession, see editorial in the Chicago Daily News, September 14, 1916.

and was addressed by Prof. Frank J. Goodnow, the president of John Hopkins University, on the subject of "Administrative Discretion and Private Rights."

The general council presented the name of Hon. George W. Sutherland for president of the association, and in accordance with custom, he was unanimously elected. In the vote of the general council, however, representing all the states and territories represented in the association, he was only selected by a majority of four votes over Walter George Smith of Pennsylvania.

There was much dissatisfaction expressed over outside interference in connection with the nominations this year, and if the work of the general council is to carry confidence to the bar as a whole, it must be free from any such intimations. It was reported upon well-authenticated grounds that a number of telegrams had been sent by persons not connected with the association requesting members of the general council to vote for certain candidates. Some feeling was created, too, by the interference by some of the administrative officers of the association in the matter of the selection of the incoming officers, and good taste would seem to dictate that no such officers should attempt to control the selection. It is also equally clear that the members of the general council who sit in the conference as representatives of their respective states, should take steps to ascertain the views of the members of the bar they assume to represent, and should not attempt to carry out their own personal views in such matters against the judgment of the bar whose representative they are, and for whom they purport to speak.<sup>16</sup>

The meeting closed with the annual dinner of the association presided over by president Elihu Root, and at which the speakers were: Judge Charles S. Cutting, the president of the Chicago Bar Association, Sir James Aikins, the president of the Canadian Bar Association, Mr. George T. Page of Peoria, the chairman of the general council of the American Bar Association, and Mr. Frederick W. Lehmann, former Solicitor-general of the United States and a former president of the association, who took occasion to discuss the recent passage of the Adamson Eight Hour Law, and severely criticised the action of Congress in the passage of it under practical duress.

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16. See X ILLINOIS LAW REVIEW 222 for further discussion of this question.

Mr. George T. Page of Illinois, who had been honored by re-election as chairman of the general council of the American Bar Association, which carries with it membership *ex-officio* in the executive committee, was re-elected a member of the general council from Illinois, and Mr. John T. Richards was re-elected vice-president for Illinois.

The plan for the re-organization of the American Bar Association proposed by the executive committee, as heretofore commented upon, will involve certain changes in the general council, as well as in the local council. It is highly desirable that there should be a continuing membership in the general council, where influence is to some extent based upon length of service, but it is believed that the best interests of the association would be served by having constant changes made in the vice-president and local council from any given state, selecting the vice-president one year from among those serving upon the local council the preceding year.

It is to be hoped also that the recommendation of the delegates from Illinois with reference to a meeting of the American Bar Association members within a state, while not officially approved by the American Bar Association, will be carried out in spirit hereafter, nevertheless, by the members of the general council, in order that there may be a real conference concerning the views of members of the association, and that they may be fully represented in any discussion which may take place with reference to them in the American Bar Association.

N. W. MacC.

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### THE ILLINOIS STATE BAR ASSOCIATION MEETING

The annual meeting of the Illinois State Bar Association is presumed to be the climax of the year's work. The Fortieth Annual Meeting was no exception, and it formed the climax of the notably successful administration of President Nathan William MacChesney.

Rumors have been current for several years, of the organization of a judicial section, similar to the one organized by the American Bar Association three years ago at Montreal. It remained for the MacChesney administration to bring such a section into being; and when Judge McSurely welcomed the visiting judges at the first meeting of this section on the afternoon of May 31, there were in attendance more than fifty judges of the various courts of Illinois. Chief Justice Farmer in opening the meeting, said:

"The judges are not only interested in the correct and efficient administration of the law, but they are deeply interested in administering the law and discharging their duties in office so that they will command public esteem and confidence. I think we can, by conferring together, make suggestions, the carrying out of which will further tend to the efficient administration of justice through the courts, and necessarily bring with it a greater respect for the law and its administration."

Consistent with the usual judicial attitude of trying to get the real point of the case as soon as possible, the meeting immediately commenced business and started a discussion of "needed legislation for County and Probate Courts." Judge Henry Horner of the Cook County Probate Court, was the first speaker. He spoke in part as follows:

"Under our present statutes, a trial is had on its merits in the Probate or County Court in probate matters. Six days, two months, three months, or six months may be expended by the judge of that court in trying a case. After the case is tried, either by a jury or by the judge, and judgment is entered, all the defeated party desiring to avoid the effect of the judgment or order, is required to do, is to appeal to the Circuit Court—file his bond and pay the nominal amount of appeal costs, and then there is a trial *de novo* in the Circuit Court. Probate and county Courts in probate matters, become in such cases merely moot courts. The only result the present practice can produce is the clogging up of the calendars of the Circuit Court, and the cultivation of an indifference on the part of the probate administrative officers and others for the orders and judgments of the County and Probate Courts in probate matters.

"The second suggestion I have to make is this: In hearing wills in the Probate Court the law limits the testimony to that of the attesting witnesses, except in cases of fraud, compulsion, or other improper conduct. But if the will is either denied or admitted to probate and an appeal is taken to the Circuit Court, the proponent of the will can bring in any evidence admissible in chancery, to prove the execution of the will. In other words, on a trial *de novo* of the same subject-matter, on the same issues, there is an enlarged latitude for the admission of evidence. The law ought to be amended to allow the same proof to be taken in the Probate Court and the County Court hearing probate matters, that can be taken in the Circuit Court. There is no reason for that incongruity in the practice.

"Again judges of the Probate and County Court should be denied the right to practice law in the counties in which they are elected. In all counties of the state, except probably Cook County and Will County, and some of the larger counties, these judges practice law in their counties. Of course, the law prohibits them from practicing in probate matters. I can not imagine anything more improper in judicial

administration than a judge leaving for a time, the bench, and trying a case with the venom and personalities that too often develop in a lawsuit, against a lawyer who the next day may appear before him in his court. The only way to prevent that is to see to it that the salaries of county judges outside of Cook County are increased to a living wage."

Judge W. L. Pond of DeKalb County, voiced one of the needs of legislation for the country districts when he suggested that,

"One of the troubles that nearly all of the county judges meet — is under the present drainage law. Practically every county judge in the state of Illinois has come in contact with the farm drainage act or levee act. Like many others, I do not generally know where I am at when I start to try one of these cases. I finally get through, and let it pass up to the Supreme Court. I presume those gentlemen do not know where they are; I have sometimes thought maybe they did not; but I have always bowed, anyway, and said, 'that is right,' and let it go.

"I believe the matter can be simplified. We have now upon our statute books a law that has been well settled in the state of Illinois, in our special assessment law for local improvements. With a very little change—after we get beyond organization of the drainage district—with a very little change in the special assessment act you can make it apply to the farm drainage act procedure, and proceed along the same lines, and that I believe would assist us and help out the matter materially."

Other judges joined in the discussion, and the question then shifted to a discussion of probation law, led by John W. Houston, chief probation officer of Cook County. He offered many valuable suggestions concerning this important work and its administration in Cook County. Judge Roscoe J. Carnahan of Stephenson County, joined in the discussion stating his experience as a county judge, and Judge Jacob H. Hopkins in an interesting way reviewed the operations of the probation system in the Municipal Court of Chicago.

The next subject considered was: "Should Courts Take Cognizance of Public Sentiment?" Mr. Justice Frank K. Dunn of the Supreme Court of Illinois, led this discussion, summing up his arguments with the statement:

"The people made the laws. They are the expression of the public will, or public opinion, and the people have the right to criticise them, or to amend or repeal them in the manner authorized by law and the constitution; but so long as they are laws they are binding on the judges and courts as well as on the people. They cannot be set aside for something else, which a court or a judge may regard as more in accord with the prevailing sentiment of the community, known as pub-



lic sentiment; and the honest opinion of a court as to the validity or construction of a statute ought not to subject the court itself to criticism. A favorite remedy for any evil which people imagine to exist is to get a law passed and it is then thought frequently that the reform has been effected. When it turns out that little or nothing has been effected, either because the law as passed was in conflict with some constitutional prohibition, or was so crudely drawn as not to express the object it was intended to accomplish, criticism is directed, not against the law which fails to accomplish the purpose of its passage, or the constitutional prohibition which rendered it ineffective, but against the court for rendering the decision which it could not avoid rendering if it obeyed the law and the constitution. Of such public sentiment, courts can take no cognizance. A sentiment which would destroy constitutional limitations or reduce their obligation, cannot be entitled to any consideration. Public sentiment as to what decision should be rendered in a particular case, or as to whether a public law should be sustained, or how it should be construed, has no place in the deliberations of the court and should have none. The only public opinion of which the court can take cognizance in the particular case is that expressed in the constitution and the statutes. In them is written the popular will and they constitute the chart whereby the court must always direct its course. Pontius Pilate, though he declared that he found no fault with the man, Jesus, touching those things whereof he was accused, yet, willing to content the people, permitted them to elect whether he should release Jesus or Barabbas, and washing his hands in token of his innocence of the blood of this just person, caused the just person to be scourged and delivered him to be crucified. Public opinion was with him, but infamy has followed him through the ages."

Judge Charles A. McDonald, Chief Justice of the Superior Court of Cook County, Judge James C. McBride of the second district Circuit Court, and Judge Samuel C. Stough of the City Court of Canton, joined in this discussion. Judge Orrin N. Carter then summed up the discussions with these remarks:

"The greatest historical writer this country ever had, in writing about the slavery question, said that it was found that the United States constitution was not like the rock of Gibraltar, that stood unchanged through ages, but it was found more like a great glacier, that moves slowly down the valley formed by public opinion, and conforming to the valley as it moves. That carries out the idea of my learned associate here on my left, when he said very admirably, in a way that I hope will be remembered by all of us, that the public opinion which the lawyer and the judge observe should be the spirit of the age and not the opinion of the hour. And that is what the historian meant when he said the Supreme Court of the United States had conformed its ideas to the ideas of the generations as they passed, with reference to the slavery question."

In order that the judicial section might become a permanent feature of the State Bar Association meetings, the following resolutions were adopted:

"First, that the judges in attendance at the first session of the judicial section of the fortieth annual meeting of the Illinois State Bar Association, indorse the plan of holding hereafter, annually, on the day preceding the meeting of the Illinois State Bar Association, a judicial section meeting.

"Second, that it is the sense of the meeting that the president of the Bar Association for the coming year appoint the incoming chief justice as chairman of the section, and that such practice be followed hereafter.

"Third, that the president of the bar association appoint a vice-chairman of the section who shall be a member of the bar.

"Fourth, that such chairman and vice-chairman shall recommend such further organization to the section as they shall deem wise, and the president of the association shall appoint a committee on judicial section, and such other officers and committees as necessary.

"Fifth, that the right to participate in the section be confined to the members of the judiciary, or former members of the Supreme Court of Illinois, the president of the Illinois State Bar Association and former presidents and the vice-chairman of the section.

"Sixth, that the committee on judicial section be empowered to devise rules, if deemed wise, confining attendance at the meetings of the section or particular sessions thereof to members of the judiciary, former members of the judiciary, the president of the Bar Association, the former presidents of the bar association, vice-chairman and members of the judicial section committee and former vice-chairmen of the section, with such other additional regulations as they deem wise."

The general meeting of the Illinois State Bar Association began at 10:00 a. m. June 1, when the association was called to order by Nathan William MacChesney, president. Secretary Voigt, who was resigning after ten years of faithful service as secretary of the association, presented his last report as such secretary, and at the close of his report, a resolution of appreciation was unanimously passed.

The report of the committee on new members showed that within the past year 166 new members had been admitted to the association; so that the present membership is about 2,150, being surpassed only by the New York State Bar Association's 2,900 members.

The report of the program committee showed unusual activity during the past year, five dinners having been given by the as-

sociation, the guests of honor being our Supreme Court justices, the deans of the various law schools, Mr. John Barrett, Senator Burton, and Theodore Roosevelt. These events created great interest in the work of the state bar association and were attended by a large number of its members and friends.

Mr. Frederick A. Brown, chairman of the committee on constitutional law reported that within the year the association had been changed from a voluntary association to a corporation; that the form of government had been changed from an executive committee appointed by the president, to that of a board of governors elected by the membership, and that steps had been taken to establish permanent headquarters for the association.

For his annual address, President MacChesney selected the subject, "Uniform State Laws." President MacChesney covered the entire history of the movement for uniform state laws and his address is said to be the most exhaustive presentation ever made of the subject.<sup>1</sup> At this time five important Illinois statutes governing negotiable instruments, warehouse receipts, sales, bills of lading, and marriage evasion are acts drafted by the Uniform State Laws Commissioners, and it may be expected that there will be adopted in Illinois an increasing number of other uniform laws prepared by the same commission for adoption in all the states of the union. President MacChesney said:

"May I call your attention to the fact that legislation on every subject in this country is today the product of national thought and national agitation, and that this fact should be given due recognition, even though the subject-matter of the legislation is supposed to be local. More and more every day the citizens of this country are coming to think in terms of the nation. It was said in the time of Washington that some of the people thought locally, and others thought continentally. It is not less true today, but those who have the national point of view are in the ascendancy now, and unless there is a determined effort to have the states unify their laws by consent, nationally, along progressive lines, there will be a constantly increasing and determined effort to have the federal constitution so construed or amended as to give to Congress power to enact general laws on subjects of general concern, which shall be applicable to all the people wherever the power of the United States extends.

"Commerce has outstripped and over-leaped the boundaries of the states long ago. The division of power between the state and the nation is a wise and beneficent one, but the states, through such uni-

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1. [Any one interested in this important movement in law reform may obtain a copy of this address from the secretary of the State Bar Association.—Ed.]

form state laws as these applied to ever widening fields, must either meet their responsibilities or lose still further their prestige and power.

"While common language, religious impulses, racial characteristics, national traditions, social customs, or common law all promote national unity, surely law common to all sections of our country is not least among these.

"Through ever increasing attention to and interest in 'uniformity of law, then, let us seek to advance the efficiency of our government, preserve its democracy, and achieve its national unity."

The annual address was delivered by Hon. Walter George Smith, of the Philadelphia bar, who took as his subject "Legislative Tendencies." In a scholarly manner he related the history of legislative tendencies in England and America as shown by legislation of our various governing bodies developing the idea that,

"The trend of legislation will show that the people in their reaction against evil conditions, which conservative thinkers believe arise not so much from defects in the old constitutions as from the indifference of the people themselves, shows a strange loss of their sense of proportion. The theory of checks and balances is yielding to that of popular government pure and simple. In the changing conditions, it is for the lawyers to steady the reforming hand, and challenge each thrust at constitutional representative government, lest by the unrestricted power of the electorate 'one good custom should corrupt the world.'"

Discussion of the changes desired in the substantive law of Illinois, brought out interesting ideas. Thomas Worthington, Esq., of the Jacksonville bar, urged the abolition of the rule in Shelley's case. H. S. Hicks, Esq., of the Rockford bar, spoke for an amendment to the administration act to permit a non-resident heir to nominate an administrator of an Illinois estate, and for a tax amendment to the constitution. William L. Patton, Esq., of the Springfield bar, pointed out needed amendments to the act on redemption from execution sales.

Hon. William J. Calhoun next delivered an important address on the history of the Monroe Doctrine which was heard with great interest. The association then resumed its discussion of proposed changes in substantive law. Nels A. Larson, Esq., proposed eliminating a large portion of the early decisions of our Supreme and of the Appellate courts. If possible, he suggested that the members of the Supreme Court go through the decisions and cut out such as have no bearing upon present-day law, and if that could be done, Mr. Larson argued that probably half of the difficulties in

determining at the present time what the law is could be avoided.

Judge Oliver A. Harker presented a proposed amendment to the present sureties act, providing that where the principal on any bond, note, or other written obligation shall die, and the creditor fail to present his claim against the estate within two years, then the surety shall be relieved from payment of such part of the debt as could have been obtained by proof of the claim in the probate court.

The report of the special committee on masters in chancery was presented by Merritt W. Starr, Esq., chairman. The committee prepared a bill to improve practice with reference to masters in chancery, using as a basis the bill drawn by the committee of the Chicago Bar Association, and one which was drawn in the legislature. They consulted a large number of attorneys, judges and masters in chancery. The proposed legislation is of interest to all lawyers who practice before masters in chancery. It was approved by the association without dissenting vote, and the incoming president was authorized to appoint a special committee to present the same to the General Assembly and to promote its enactment into law.

The committee on legal education urged through its chairman, James Parker Hall, that a more careful examination be made of the moral character of candidates for admission to the bar. The committee submitted a question form to be given to each candidate, which would assist in an investigation of his record. The association adopted the report and recommended that the new committee on legal education take counsel with the Supreme Court and bar examiners in order that machinery may be devised for carrying out the proposals.

The association approved the report of the committee of schedule of charges as a guide to new members of the bar. William G. McRoberts, Esq., and his committee prepared a blank questionnaire as to the fees charged for various legal services, and submitted it to leading attorneys of the state. About 500 Cook County attorneys and 358 down-state attorneys replied. From these replies the committee prepared average charges made for services for each class of business in each of the three classes of counties in the state. The schedule was adopted unanimously by the association.<sup>2</sup>

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2. [The secretary of the Association will furnish copies of the schedule on request.—Ed.]

The evening session of June 1 was devoted to the meeting of the Illinois Society of the American Institute of Criminal Law and Criminology. Judge Albert C. Barnes presided, and the subject considered was "Medico-Psychological Work for Courts." Dr. William J. Hickson of the Psychopathic Laboratory of the Municipal Court, and Dr. William Healy, director of the Chicago Psychopathic Institute of the Juvenile Court, led the discussions, and were followed by Prof. Robert H. Gault of Northwestern University, and Judge Harry Olson of the Municipal Court, in interesting comments.

The last session of the association was opened by a proposal by Jacob W. Rausch, Esq., of Morris, Ill., that the association use its influence to obtain for this state a thorough and efficient vocational education system with universal military service. Franklin L. Velde, Esq., suggested amendment of the present law requiring deeds to be under seal. He urged that the requirement of seals has become obsolete in the light of modern education, and pointed out that while our legislature has passed an act validating conveyances made in other states where seals have been abolished, still in this state the law continues to require such conveyances to be under seal.

Hon. Charles J. Doherty, Minister of Justice of Canada, and representative of the Prime Minister, delivered an address on the "Rights of Neutrals and Belligerents on the High Seas." Prof. Charles Cheney Hyde professor of international law in Northwestern University, delivered an address on "The United States and the Law of Blockade." Samuel Rosenbaum, Esq., of the Philadelphia bar, who recently returned from England, where he made a special study of the courts for the American Judicature Society, with a view to the introduction of the English system of procedure in American courts, gave an account of the English method of procedure, and particularly of the work of the rule committee.

The committee to devise a plan for a retirement fund for aged lawyers and to raise funds therefor, submitted to the association their plan, which was adopted; and the committee reported contributions in excess of \$2,500. The Illinois State Bar Association is the first association to start such a fund.

The new officers of the association are: Albert D. Early, of Rockford, president; Edgar Bronson Tolman, of Chicago, Leslie D. Puterbaugh, of Peoria, and Frederick A. Brown, of Chicago,

vice-presidents; R. Allan Stephens, of Danville, secretary; Franklin L. Velde, of Pekin, treasurer; and John F. Voigt, Chicago, Roger Sherman, Chicago, Walter M. Provine, Taylorville, Logan Hay, Springfield, C. M. Clay Buntain, Kankakee, and George H. Wilson, Quincy, members of the board of governors.

R. ALLAN STEPHENS.

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### AN EDITORIAL CHANGE

The present issue of the *ILLINOIS LAW REVIEW* marks the retirement of an editor-in-chief, and the introduction of a successor. Professor Costigan's term of office extended over a period of seven years, beginning with Volume IV, No. 3 (October, 1909) and ending with Volume XI, No. 2 (June, 1916). Professor Costigan in his editorial published April, 1916, generously accorded credit to his predecessors, Professor Frederic C. Woodward and Professor Roscoe Pound, for the creative labor which gave the *ILLINOIS LAW REVIEW* "its form and its development." In the same spirit of self-effacement, he also attempted to minimize his own part in continuing and solidifying the policies developed, in what he styles the "critical months of the *REVIEW*'s history," by the statement "that in the early months of the *REVIEW*, which was a pioneer in its field, the influence of the editor-in-chief was naturally much greater than it can be today."

The fact remains, however, that the office of head editor, up to the present time, always has been one of genuine responsibility and of administrative burdens little relieved by division of labor or delegation of function.

There is undoubtedly an easy way and a hard way of editing a law journal. Professor Costigan's way was the hard way. It is a quality of his mind to see nothing unimportant in the ways and means of a thing to be accomplished. The means was as important as the end; and no step in a process of thinking or acting was ever considered by him as undeserving of a reasoned judgment. He had a conscience not simply for large issues, but, what is rare in human nature, even for details. In the complex interrelation of human effort in modern work, his ethical sense of duty, and his pride in the thing which he represented, compelled him to assume responsibility for obstacles beyond his control. Tolerant to excess with the frailties of others, he was intolerant with himself in his performance of duty. Under this painstaking leadership, the

ILLINOIS LAW REVIEW, although representing primarily the interests of the Illinois bar, has been brought into first rank among law journals of this country.

It must be remembered, also that during these years, Professor Costigan has carried a heavy burden of professorial labor, and has rendered important services to the law as an author. That with these more important and time-consuming duties he has been able to edit the ILLINOIS LAW REVIEW in a manner which eloquently speaks its own praise, requires the somewhat personal explanation given. It is, therefore, with genuine regret that we record the retirement of Professor Costigan as editor-in-chief, but although acceding to his request to be relieved of that office, the ILLINOIS LAW REVIEW still may claim the benefit of his judgment as a member of the managing board, and of his talents as associate editor.

A. K.

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## CORRESPONDENCE

### THE PRESSLEY LITIGATION AGAIN

BY WILLIAM H. BLYMYER<sup>1</sup>

TO THE EDITOR OF THE ILLINOIS LAW REVIEW:

The inquiry made by Dean Wigmore in the REVIEW for May (Vol. II, p. 45) as to what we should do to avoid such legal complications as have arisen in the Pressley litigation should at least start Americans to do some thinking.

The tentative suggestion of having a "Chief Judicial Superintendent" would simply be to center in one man functions that are now lodged in many—the judiciary committees in the legislatures and the courts in making rules and revising or making decisions—which plan offers very little assurance of improvement, as it could hardly be expected that an incumbent of that office could always be found who would excel such bodies in wisdom and power to effect legislation; and then, in both cases, the support of the people must be had.

A sure remedy is easy to suggest, but difficult to accomplish, for it involves a struggle against long established practice, or prejudice.

Were we to behold Chinamen complaining of the complica-

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1. Of the New York City bar.



tion of a literary system that required a separate character for each word, and yet refusing to examine one in which all the words were expressed by twenty-six characters, we would simply have pity on them.

To state that we appear like the Chinamen to the European jurist who has studied our system, is simply to invite incredulity; for, in other accomplishments, we feel that we have outdistanced Europe, and it must be likewise so in the law; and, moreover, it offends our pride in our oft-vaunted Anglo-Saxon heritage. If we look for improvements, we go no further than to consider some English modifications, or turn to New Jersey, where the common law and chancery practices have been least disturbed by legislation, as did the New York Constitutional Revision Commission last summer, supposing that, by going back to this fountain head, it would get a better start.

What is our English common law? It is the recorded action of a strong-headed people so thoroughly satisfied with their own capabilities that when they emerged from barbarism sufficiently to feel the need of a system of law, they turned aside from a marvelous one, developed scientifically and which had been in use for a thousand years, and began to build up one, in matters that the church could not control, out of their own experiences from cases as they arose. The early reports, especially, show that the principle each time was usually decided by a single judge, with almost no enlightenment from precedents, often influenced by the surroundings of the case. It can be imagined, that the principle was affected by the way that he had dined; and, that it wobbled backward and forward for years until it came before a judge whose reputation imparted to it sufficient authority to give it permanency.

Its history is a succession of breakdowns; and each time, recourse has been had to the Roman law, most notably under Lord Mansfield's administration, by the wide introduction of chancery rules into the common law procedure.

It is appalling how we Americans grovel when we might be walking in the light; but a little reflection shows how natural this conduct is; for, as a whole, we are a busy people, with no time to learn more than our own systems, or to overcome the barriers of foreign languages.

It can safely be said, that, in our history, no Continental jurist, and even no graduate of law, or *doctor juris*, has come to this country and mastered the American system sufficiently to be moved

to make comparisons, and, at the same time, has gained a position among us that would permit him to advocate the adoption of Continental methods. Even no Englishman has undertaken this role. While, on the other hand, a number of young Americans have studied law abroad, they have done so before having had practical experience here; they have apparently not gained impressions that have been deep or reinforced by practice abroad; and they have had no special message for us. We, therefore, content ourselves with a few Latin phrases from Kent, Parsons, and Story, for our insight into the advantages that the Civil Law can offer.

Notwithstanding the proximity of England to the Continent, it seems that the door has only once been opened from that country. John Austin went to the Continent in 1826 for two years to prepare for a course of lectures to be given at University College. The attention given to his lectures upon his return was very slight, but he had among his hearers John Stuart Mill and Henry Maine, and through them he handed on the torch which has done so much to advance the English practice to a position far above our own.

What these English ancestors did for us, was to insist, that, in those matters of which they had obtained control, the judges should not be trusted; and so provided that questions arising in them, especially those affecting the veracity of witnesses and the fixing of damages, should be submitted to laymen brought together by chance. This necessitated the conduct of the trial from beginning to end at a single sitting, as it could not be expected that the twelve men could be reconvened at a later date; and therefore, it followed, that rules must be devised, some, in order that these men, unlearned in the law, should only hear and see what was considered proper for their guidance; and others, that the parties might know for just what issues they should prepare. These are the rules of evidence and procedure; all very necessary for such a system; all very admirable as problems in logic; and as to the former, Dean Wigmore has certainly distinguished himself in the most complete exposition ever made.

However, should you enter the office of a Continental lawyer, or advocate, and ask to see the works on evidence and procedure in civil cases, he would tell you that he had none, as, with no jury, there was no need for any; that the pleadings of a case consisted only of a plain statement of the contention; and that the judges determined the weight to be given to matters presented as evidence.

You say: That would not satisfy Americans: They must have juries. But why? Is it because the jurymen can do the work

so much better than the trained jurist, or because we also must have protection from the judges? You will surely not give the first reason. If you state the latter, how does it happen, if we still make some pretension to consistency, that we confide the most vital interests of life to a single judge, even the disposition of our property at death, the matter of our relations with wife and children, all matters relating to vessels, and all partnership and trust relationships, and will not allow the fixing of damages when more than twenty dollars are claimed, to be determined, even by a bank of judges?<sup>2</sup>

It is a sad commentary upon our sanity; we are not making use of our intellects.

Returning to Dean Wigmore's inquiry, the litigation in point would give a civil law court no difficulty. Parties can be brought in at any time and if the judgment is modified or reversed on appeal or revision, the judges in the Court of First Instance are on hand to continue the proceedings to completion, almost as though there had been no interruption.

Our most serious handicap, is the fact that we are bound to this baneful jury system by our constitutions, state and federal, so that, unlike the conditions of any other science where the inventor can almost always find some one who will try out his ideas, no change can be wrought involving this institution until the legal profession as a whole in a given state, or in two-thirds of the states, respectively, is ready to act for it. Furthermore, such work is rendered most difficult through the fact that the great national bar association is dominated by a group of very conservative men, so that instead of stimulating any great reform, it impedes it. This point is well illustrated by the remark of its president, when, as president-elect of the New York Constitutional Convention, last year, he stated at a luncheon of the Merchants' Association of New York, in what was announced to be the "keynote address,"

"Our laws, fundamental and ordinary, are to be based upon our history. It is not the function of legislators to put into law what happens to occur to them as being a pretty good thing. It is their function faithfully to register the customs and mature conclusions of the people whom they serve, so that each successive step in legislative development may be but a record of the growth and development of our life."

Dean Wigmore struck the right word in the very first line;

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2. The Green Bag, for May, 1914, contained a very exhaustive paper by the same writer, on the uselessness of the jury system in civil cases, and its introduction into the American system almost without reason.

the word "efficiency." Are we to consider it now, or to wait until German *Kultur*, which is only another word for it, or intelligence, in its progress around the world will have taken from us prestige that will require many times the effort to regain.

What our legal system needs is a body of men who will use their intellects free from prejudices. This seems simple; but such men are still very rare.

## COMMENT ON RECENT CASES

### CRIMINAL LAW—JUDGMENT ON DEMURRER TO PLEA IN BAR.—

It is rather a matter for wonder that, at this late day, there should be any doubt as to the power of a court to allow a defendant to plead over, on sustaining a demurrer to his plea in bar, in a prosecution for misdemeanor. Yet this is the question discussed at considerable length in *United States v. Rockefeller*, 226 Fed. Rep. 328 (District Court, Southern District of New York). While the decision is in favor of the power, the question, it seems to us, could have been more summarily disposed of, if the court had drawn a sharper distinction between what the defendant is entitled to as a matter of right and what he may be granted in the exercise of the court's discretion. *Rex v. Taylor* (1824) 3 B. & C. 502; 5 D. & R. 422, it may be conceded, holds in unmistakable terms that in a case of the present description the judgment is final. But that decision proceeds on the ground that in misdemeanors, as distinguished from felonies, the rule of civil pleading is applicable. In case of a felony the defendant was entitled to plead over as a matter of right, *in favorem vitae*, but in a case of misdemeanor this reason was absent. Now in civil causes, after argument and opinion of the court, the rule under the former practice in England was only that it was not of course to allow the defendant to withdraw his plea in bar and plead over (See 10 ILLINOIS LAW REVIEW, 424, n. 26); in a proper case, however, this would be permitted. Hence *Rex v. Taylor*, *supra*, cannot be regarded as trenching on the discretionary power of the court to grant the privilege of pleading over, as a matter of indulgence.

In many jurisdictions there are statutes providing for a judgment of *respondeat ouster* on the sustaining of a demurrer to a plea in bar in a civil cause, but in others, as in Illinois, the defendant must depend on the discretionary power of the court in this regard. So freely is the discretionary power exercised with us that pleading over has come to be virtually a matter of course. One accustomed to the form of practice finds it difficult to understand why the court, in the principal case, should have found *Rex v. Taylor* such a stumbling block.

R.W.M.

WILLS—ATTESTING WITNESS, COMPETENCY OF STOCKHOLDER OF CORPORATE EXECUTOR AS—SECTION 8 OF WILLS ACT APPLIED.—The unreal basis for the common law rule rendering entirely incompetent an interested witness is perhaps better illustrated than in any other connection in those cases which, under the provisions and exceptions of the Illinois Evidence Act, hold disqualified a stockholder of a corporation suing or defending against the personal representative, devisees, legatees or heirs-at-law of a deceased person. That there is any actual danger that a stockholder will perjure himself for his corporation's benefit because of a possible increase in dividends, with whatever assurance there is that the perjury will not be discovered because of the death of the other party to

the transaction in suit—the assumption which must be the basis of the rule and the statutory exception—is absurd and a conclusion not in keeping with the attitude or practices of the very great majority of men and women. The right to cross-examine and the opportunity of attacking credibility on the ground of interest furnish sufficient safeguards in any event.

The common law rule, retained in the exceptions made in the statute, requires that the interest, to disqualify, must be in the outcome of the suit in which the witness is called, and must be certain, direct and immediate. It may well be doubted whether the interest of a stockholder, properly viewed, is within this rule. Our Supreme Court, however, has had no such doubt and invariably has held a stockholder incompetent where his corporation was involved in litigation with persons claiming for or through a decedent. See *Consolidated Company v. Keifer*, 134 Ill. 483, 25 N. E. 799; 27 L. R. A. (N. S.) 819, note.

Applying and bound by the rule laid down in the *Consolidated Company* and other cases, the Supreme Court in *Scott v. O'Connor-Couch*, 271 Ill. 395, 111 N. E. 272, holds that a stockholder of a trust company which is nominated executor of an instrument propounded for probate is an incompetent attesting witness thereto. But the court saves the will, to whose validity the stockholder's testimony was essential, by holding that the case falls within section 8 of the Illinois Wills Act which renders attesting witnesses to whom any beneficial devise, legacy or interest is made or given by the will compellable, if necessary, to testify, the devise, legacy or interest as to such beneficiary thereupon, however, becoming null and void. The stockholder was rendered competent by the statute, but his corporation was held disqualified from acting as executor.

In reaching this conclusion the court is under necessity of considering and distinguishing *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255. The executors and trustees under a purported will considered in that case were under contract with one of the necessary attesting witnesses to share with him any earnings as executors or in any trust capacity. It was held that the attesting witness was disqualified through interest and that the case was not within section 8. His interest, the Scott opinion points out, arose not by reason of any beneficial devise, legacy or interest made or given in or by the will, but out of a private contract wholly outside the will. On the other hand, says Justice Cartwright, writing the opinion in the Scott case:

"In this case the incompetency of Pankey arose from the fact that the will gave a beneficial interest to the corporation of which he was a director and a stockholder and the beneficial interest was direct, immediate and substantial. Every dollar and every piece of property that comes to a corporation comes directly to the stockholders and increases the value of the stock. In substance, the stockholders collectively, represented by the artificial corporate entity, were executors of the will. The interest of Pankey was derived directly from the will and not through any private contract or arrangement outside of it and his incompetency arose directly from the

beneficial interest given to him and the other stockholders as a corporation. The statute applied, and the court erred in striking out his testimony."

The distinction as expressed is not easy to grasp. Viewing the stockholder and corporation as two separate and distinct persons whose relation is that arising out of the stockholding contract, no distinction between the two cases is apparent. It is only by regarding the corporation as the aggregate of its stockholders that basis for distinction is given. Thus only can it be said that the stockholder-witness takes directly and immediately under the will. The language of Justice Cartwright above quoted shows that this was in mind; substantially it was the stockholders who were appointed executor. Did the court shatter theories of corporation jurisprudence? Can one reconcile the declaring null and void of the interest of *all* stockholders with the statute's provision that the beneficial interest of *the witness* be null and void?

It would be worse than useless to speculate on these questions. One might determine that the court had exceeded its constitutional limitations and usurped legislative functions; one undoubtedly would become hopelessly entangled in the metaphysics of the corporate entity. In the end, it must be conceded that the court has earned commendation: forced by statute and case law to observe the unscientific and illogical interest disqualification, it yet has found a way to modify the rigors of its application. It would have been so simple, so easy, to follow the rule laid down in the Smith case.

Strangely enough the situation presented in the Scott case—the witness a stockholder of a corporation for profit—has rarely (but once in so far as a rather hurried examination of standard collected cases and digests shows) been considered by American courts of last resort. The case of *In re Marston* (Me.), 8 Atl. 87, 96, 97, would seem to hold competent stockholders of pecuniary corporations benefited by the will, but the facts of the case bring it virtually within the rule of the non-pecuniary corporation cases. The courts have, except in Pennsylvania where a statute intervenes, held that officers, trustees and members of non-pecuniary corporations and tax payers of municipal corporations are competent to attest wills making gifts to their respective corporations, the reason being that they receive no direct financial benefit. See *Boyd v. McConnell*, 209 Ill. 396; 70 N. E. 649; note 36 L. R. A. (N. S.) 504. *Quaere*: Would a showing of the insolvency of a corporate beneficiary organized for profit, either as of the time of the execution of the will or of its propounding for probate or as of both times, remove the common law disqualification of its stockholders acting as attesting witness? The question whether or not the stockholder actually is financially benefited is not material under the rule as laid down in the Scott case. To make it material in most instances would lead to collateral inquiries which would render the application of the rule impracticable. No other way, however, to reconcile the two lines of cases adequately is apparent.

In passing may we be pardoned if we express no exceeding sor-

row that the trust company in the Scott case found itself disqualified. The report of the case indicates that the corporation acted as lawyer in the preparation and execution of the will. That it overreached itself need cause neither surprise nor grief.

R. Y. H.

**QUASI-EASEMENTS—IMPLIED GRANT.**—The question of "implied grant" and "implied grant back" as effective to create a quasi-easement is again considered in the case of *Adams v. Gordon*, 265 Ill. 87, 106 N. E. 517. In that case one Gordon entered into a contract with one Adams, for the sale of a portion of Gordon's land. The contract provided that the purchaser should have the right to the use of a well located on the portion of the property retained by Gordon, also the right to a path from a gate to the well. The contract provided that the purchaser should maintain the well, and a pump, engine and tank at the well and to furnish water for use of Gordon without expense to the latter. None of the provisions relative to the well, pump, engine, tank or path appeared in the deed passing the title. The purchaser obtained his water from the well through a pipe which entered the ground near where the tank was located on the grantor's land, and was visible on the grantee's land where it left the ground and connected with faucets, plugs, etc., on the latter's land. The case arose on a bill by a grantee of the purchaser against Gordon to enjoin interference with the complainant's use of the water, and of the path for the purpose of attending to the engine, tank, etc., in order to get water.

Under these circumstances the Supreme Court directed that the demurrer of the defendant to the bill of complaint of complainant setting up substantially those facts, should be overruled, on the theory that the facts showed an implied grant of a quasi-easement. In its opinion, the court lays stress upon the point that it is not important that the easement be necessary, so long as it is highly convenient and beneficial to the use and enjoyment of the property purchased.

In that connection, reference is made to former comments upon this subject, appearing in 3 ILLINOIS LAW REVIEW, p. 187, and in 4 ILLINOIS LAW REVIEW, p. 430. Upon the proposition that a grant of quasi-easement in order to be implied in favor of a grantee, must be *de facto* in existence, continuous and apparent, which this easement, it seems, was, no difficulty, possibly, now exists in the law in Illinois. Upon the question whether an implied grant back, must also contain the element of reciprocity, this case is not valuable because this was a case of implied grant and not one of implied grant back.

It would seem, however, that the same result might have been arrived at on another theory. It is submitted that this might as well be considered, in equity, a positive easement on the theory of a contract for an easement. See 9 ILLINOIS LAW REVIEW, p. 281. The court, it seems, did not consider that phase of the situation but seems to take it for granted that the deed merged the contract so that the



contract was of no value whatever. 265 Ill. 96. Within the rule that parol evidence may be introduced to explain, vary or rebut the consideration stated in the deed it would seem that evidence might have been introduced to show that part of the consideration for the conveyance, was represented by these easements, and with a contract, upon consideration, for an easement, possession and use, doubtless, would furnish the other requisites to substantiate the easement in equity. *Kinzie v. Penrose*, 3 Ill. 520; *Sidders v. Riley*, 22 Ill. 109-111; *Booth v. Haynes*, 54 Ill. 363-364; *Huebsch v. Scheel*, 81 Ill. 281; *Llyod v. Sandusky*, 203 Ill. 621; *Brosseau v. Lowry*, 209 Ill. 405; *Spence v. Int. Acc. Ins. Co.*, 236 Ill. 449; 9 ILLINOIS LAW REVIEW, 281.

E. M. L.

COVENANTS RUNNING WITH THE LAND IN EQUITY—RESTRICTIVE COVENANTS.—The case of *Gerling v. Lain*, 269 Ill. 337, 109 N. E. 972, recalls the question, Is a restrictive covenant enforceable in Illinois by one who has no property interest liable to be affected by its breach or performance and who bears no relation to the property against which he seeks to enforce it other than that he was the covenantor in the instrument by which the covenant was created? The case of *Van Sant v. Rose*, 260 Ill. 401, without question, answers that in the affirmative. It was suggested in 9 *Illinois Law Review*, 58, that that case was wrong and that the application which that case made of the operation of the case of *Hays v. St. Paul M. E. Church*, was not justified. Now comes the case of *Gerling v. Lain* with the *dictum* (p. 340 of that case) that "a court of equity may in a proper case enforce a personal covenant against a grantee or assignee with notice." The case itself involved a covenant in a deed whereby the grantee was to construct a driveway along the east side of the granted premises for the benefit of premises retained by the grantor and the grantor was to have the right to use the driveway "so long as friendly relations exist between the parties." Thus it was quite unnecessary for the court to go any further than to point out *first*, that the covenant was a positive and not a negative one and *second*, that the covenant being uncertain in its operation, i. e., so long as friendly relations exist, was not such as equity would attempt to enforce. However, apparently in conceding a point made by counsel in the case, the court makes the statement above referred to relative to the enforcement by a court of equity of personal covenants and then holds that this particular covenant was not enforceable because of its indefiniteness.

In support of this statement of enforceability of personal covenants the court cites *Willoughby v. Lawrence*, 116 Ill. 111, which was not really a case of covenant at all, but rather one of easement in gross. In that case one who had a ten year leasehold interest in certain property used as a race course, granted to appellants a right (easement in gross) to use fences and buildings on the property for advertising purposes. This leasehold subsequently passed to the assignee of the lessee, who tried to interfere with the right of the appellants thus to use the fences and the buildings.

If the provision in the case of *Gerling v. Lain* had been for a stated time, or forever, it would have given an interest outright in the property, i. e., an easement. Thereupon the question would have been, not the enforcement of a covenant, but the protection of an easement. The further provision, however, for the making of a cement driveway would have been a positive covenant in aid of an easement, and while, possibly, one that would run at law, would not run in equity as not a negative covenant, or one from which the negative could be implied.

It must follow that if the covenant in the *Gerling* case had been anything but indefinite, it would no longer have been a personal one, but would have become one that would run at law, yet not in equity. Therefore, it is submitted the uses by the court of the term "personal covenant" is misleading, as it is inapplicable to the proper decision of that case.

E. M. L.

**WATER RIGHTS—OVERFLOW FROM DIVERSION OF NATURAL FLOW OF DRAINAGE.**—Where a private individual or corporation, pollutes a stream or floods another's land it seems the courts consider such act a nuisance with the result that each continuing act of pollution or of flooding, constitutes a separate cause of action. And, possibly, any other act of interference with the right of a riparian owner to the flow of the stream as it was wont to flow, or with the natural flow of drainage water or even an interference with one's right to percolating waters would be a nuisance on similar considerations, so long as it involved a situation where the use or enjoyment by the complaining party of his land was unduly interfered with, under the rule *sic utere tuo ut alienum non laedas* (9 ILLINOIS LAW REVIEW 278; 6 ILLINOIS LAW REVIEW 393; 8 ILLINOIS LAW REVIEW 59), and a recovery allowed for each continuing act. In other words the injury is considered temporary.

However, where the actor committing the injury is a corporation or body vested with powers of eminent domain, a different rule applies. If the act is one performed lawfully, and in accordance with the approved methods of science (as in the erection of a structure or construction of other work) the injury is not a nuisance, but is a permanent injury, and all damage must be recovered once and for all within the statutory period for bringing actions for that type of injury. In such case the injury is not a continuing one, and it seems that a recovery of damages in such case includes compensation for all injury sustained and to be sustained from such act of the corporation or public body. (8 ILLINOIS LAW REVIEW 326; 9 ILLINOIS LAW REVIEW 567). But this rule of one recovery for all damages past, present and future is confined to such damages as flow from the particular act properly performed, so that if the act consisted in the constructing of a canal that did not take care of all the flow of water reasonably to be expected, it could not be one properly performed. *C. B. & Q. R. R. Co. v. Illinois*, 200 U. S. 561; *Ry. Co. v. P.*, 212 Ill. 103.

Following out this principle, the case of *Wheeler v. Sanitary*

*District*, 270 Ill. 461, 465, 466, 467, 110 N. E. 665, appears with the further qualification that any enlargement of the original work or act constitutes another cause of action. However, it seems the judges were not agreed as to the application of this qualification. The majority opinion seems to extend the qualification to any enlarged operation of the work even where due to additional needs from a growth of population. The minority opinion adheres to a strict application of the qualification and would confine it to physical enlargement of the structure or work itself as, in this case, the physical enlargement of the canal. It is submitted the most justifiable application to adopt is that suggested by the case of *C. B. & Q. R. R. v. Illinois*, above, viz.: Upon the question whether there is a departure from the original act sufficient to take the injury out of the class of those which the original assessment of damages could be considered as having paid for, let the court determine whether it was reasonably in contemplation of the parties as reasonably minded persons at the time when the act was first done.

E. M. L.

**DEEDS—DELIVERY—ACCEPTANCE BY GRANTOR.**—In the case of *Gomel v. McDaniels*, 269 Ill. 362, 109 N. E. 996, the much harried question of delivery of deeds is raised again. The facts were as follows: The grantor of the deed in question executed a deed to McDaniels in the office of his, the grantor's, attorney. The attorney testified upon the trial that at the time the deed was executed he gave it to the grantor and explained what was necessary to make the conveyance complete, and told him that he would not keep the deed among his papers, but would have to deliver it to the grantee, or to somebody for him to be delivered at the grantor's death. The attorney later testified that the grantor then said that if that was true he would give the deed to the witness, the attorney, and it was so given, with instructions to deliver it to the grantee upon the grantor's death. A few days later the grantor had the same attorney prepare a will, and left this also with the attorney; and subsequently the grantor took back the deed and will into his own possession and they were there at the time of his death.

The trial court ruled that there was a good delivery of this deed and this ruling was affirmed in the Supreme Court on the theory that the grantor intended, in giving the deed to his attorney, to part with all control of the same.

If we accept the premise, from these facts, that this deed was delivered to a third person with the intention by the grantor of parting with control, this case comes within that great class of cases frequently erroneously called cases of delivery in escrow, where the grantor parts with control but the delivery is inoperative until the happening of some event which is sure to come. Cases of this sort are very numerous in the Illinois Supreme Court. A clear case of this type is *Fitzgerald v. Allen*, 240 Ill. 80. Also *Munro v. Bowles*, 187 Ill. 346. But there would seem to be some

question as to whether this deed was necessarily out of the control of the grantor, or that the grantor so intended it to be. The delivery was to his attorney, whose possession must be taken to be that of his principal. The facts being as inconclusive as appears in the opinion of the court, it can scarcely be said that the court's conclusion was wrong.

There was evidence on both sides as to whether or not there was an acceptance of the deed. The Illinois law requires an acceptance by the grantee. *Herbert v. Herbert*, 1 Ill. 354; *Union Mutual Insurance Co. v. Campbell*, 95 Ill. 267. In the instant case it was held that the fact that the grantee knew that the deed had been executed was sufficient evidence of his acceptance of it.

It was contended also that the deed having been taken back by the grantor into his possession, the whole effect of the transaction was nullified. This conveyance would have the same force and effect in the case of the destruction of a deed after complete transfer to the grantee. After the delivery has been completed, no act of the grantor, however conclusive in character, can affect the completed transaction. *Calleraud v. Piot*, 241 Ill. 120. While this may be so, however, it has been held in this state that the subsequent act of the grantor is receivable in evidence to prove the original character of the act as bearing on the question of whether or not the intention to part with control was present.

A. S. L.

**DEEDS—EFFECT OF ABSENCE OF SEAL—NOTICE BY POSSESSION.**—In the case of *Wilson v. Kruse*, 270 Ill. 298, 110 N. E. 359, an unusual and interesting situation arose. Wilson had commenced a suit in attachment against Kruse. T. B. Moore filed an interplea, claiming that he was the owner of the lands levied on under the above mentioned attachment. Moore claimed that his interest came, after several mesne conveyances, by a quitclaim deed from one S. L. Moore. This deed had been executed in the State of Iowa, and did not bear a seal or scroll after the grantor's signature. T. B. Moore offered this deed in evidence in support of his interplea, but its admission was refused by the court because the deed was not under seal. At the same time, counsel for T. B. Moore was not allowed to show that the deed was executed in conformity with the Iowa statute, which did not require a seal. It also appeared that T. B. Moore had gone into possession of the land pursuant to this deed, and was holding possession through a tenant at the time the attachment was levied on the land. The trial court directed a verdict with the peremptory instruction that the property attached did not belong to Moore. This was reversed in the Supreme Court on the theory hereafter indicated.

While the deed might or might not have been effective as a deed, it certainly conveyed an equitable interest—such an interest as would be recognized by a court of equity as the basis of a suit for specific performance or other relief to place the title completely and properly in the grantee of the defective deed.

In this case, the deed not being under seal could not pass legal title to the real estate. The defective deed, however, was a contract, and between the original parties affected with notice, was sufficient to give Moore good title. This would certainly be the rule in equity, and this case illustrates the extension of equitable theories to the law courts, for the equitable theory is here applied with as much effect and in the same manner as if the case had arisen on the chancery side of the court.

In this case the court held that Wilson was bound by notice by reason of the possession of Moore through his tenant, and must be taken to be aware of the equitable interest in the land by virtue of the defective deed.

A. S. L.

**FORCIBLE ENTRY AND DETAINER—INQUIRY INTO TITLE.**—In the case of *Stoddard v. Illinois Improvement Co.*, 271 Ill. 99, 110 N. E. 870, appears the statement that in an action of forcible entry and detainer the title of the premises cannot be inquired into under any circumstances. The case arose under the Practice Act upon the question whether a freehold was involved so as to give the Supreme Court jurisdiction on appeal direct from the *nisi prius* court. It would seem there is no question but that no freehold is involved within the meaning of this provision of the Practice Act, but it is believed that the statement as it appears above is too broad.

The reason an appeal in a forcible detainer suit cannot go direct to the Supreme Court proceeds from the nature of the action: it involves only possession or the right to possession, and cannot involve anything more. But to determine who has the right to possession, *prima facie* title, at least, will be inquired into. That sufficiently appears from the case of *Johnson v. Baker*, 38 Ill. 98 and *Hustalin v. Misner*, 70 Ill. 205 (cited in the case of *Thomas v. Olenick*, 237 Ill. 168, the principal case relied upon in the one now now under discussion), in each of which evidence of title was admitted in evidence, but only, so the court says, for the purpose of showing right to possession.

It is submitted the better statement and the one less likely to mislead, would have been: "In an action of forcible entry and detainer, the title of the premises cannot be inquired into except to show who has the right of possession." *Nicholson v. Walker*, 4 Ill. App 440-407; *Knox v. Hunter*, 150 Ill. App. 592.

E. M. L.

# BOOKS AND PERIODICALS

## BOOK REVIEWS

**THE MONROE DOCTRINE.** By Albert Bushnell Hart. Boston: Little, Brown & Co., 1916. Pp. xiv, 445.

Professor Hart's discussion of the Monroe Doctrine gives a concise and interesting history of American foreign relations so far as the American Continents are concerned. In that connection he treats of the different views of American policy in the Americas taken by statesmen and publicists from the beginning of our national existence. These views he prefers to call "doctrines." His comments on these various doctrines, and on the traditional policy which the United States in the main has followed, are always interesting, and have the importance which the views of a scholar of Professor Hart's standing would always have.

It is commonly stated in criticism of the Monroe Doctrine that it does not involve legislation by the Congress of the United States, that it is not embodied in international law, and therefore has no standing otherwise than as the expression of an opinion on the part of an American President in 1823.

This sort of criticism of the Monroe Doctrine is partly correct and partly whimsically incorrect. It is, indeed, quite true that the Monroe Doctrine has never been embodied in legislation, and rather is simply a tradition of the foreign policy of the United States with regard to the Americas in the past, with an implication as to what would probably be the policy of the United States in the same regard in the future. It is also quite true that aside from President Monroe's message, the doctrine as a whole is not anywhere specifically stated, and perhaps is not susceptible of specific statement. Some have inferred, therefore, that the Monroe Doctrine no longer exists, and that in any event it cannot be defined.

The situation is quite otherwise. While it is true that the Monroe Doctrine perhaps is not anywhere specifically formulated, it is nevertheless also true that it exists; that it is a very positive part of the foreign policy of the United States, not only in the past, but at the present time; and that it has the weight, not merely of the opinion which President Monroe and other American statesmen have had about it, but the further weight of the very strong probability that the United States would act to the extent of its power in defense of this doctrine.

The substance of the Monroe Doctrine is no mystery. The essence of President Monroe's statement in his message of 1823 is just as true today as it was then. The United States won its independence by force of arms, and succeeded in establishing a republican government. Naturally, the people of the United States have always sympathized with the other settlers on the American continent, who have likewise won their independence from European control, and who have likewise established republics in consequence.

As a result of this natural sympathy the United States would be strongly averse to seeing any of these independent republics reduced to subjection by any European military power.

The other side of the Monroe Doctrine is a matter of self-defense for the United States. A great European military power, having command of the seas, might easily endanger the security of the United States itself. A lodgment on the American coast by such power would make it possible to use that lodgment as a base of military operations against the Panama Canal or against the home territory of the United States. Of course this presupposes that the command of the seas should be possessed by such military power.

The Monroe Doctrine, therefore, involves the interest of the United States in the preservation of independence and republicanism by its neighbors in North and South America, and it involves looking out for its own security against aggressive European military powers.

Further, it is essential to the understanding of the Monroe Doctrine, that this doctrine by no means covers the entire body of American foreign policy, even in the Americas. Many other things may be done or may not be done by the United States in reference to Mexico, in reference to the Panama Canal, in reference to the West Indies. These other things may have, and very likely do have, and in the future would have, no reference whatever to the Monroe Doctrine.

It should also be borne in mind, however, so far as the Monroe Doctrine is concerned, that there are other ways of acquiring control of a weak power on the part of a strong power than direct military action. British Guiana was insidiously extending its area at the expense of Venezuela. To this President Cleveland strongly objected in 1895. The financial penetration of a weak country, putting that country at the mercy of a stronger power, and leading ultimately to the direct or indirect subjugation of that small power, is a familiar method of aggression. Of course if the subjects of a European power loan money to a weak country in South America, and then are unable to collect their debts, they may secure the support of their government in making collection by armed force. This on the whole seems just. Obviously, however, this would be a dangerous procedure, and might easily lead to the permanent occupation of the subject country by a European power. The United States, therefore, could not consent to such occupation and might easily object to bringing such pressure to bear for the collection of debts. On the other hand, this obviously puts on the United States a certain obligation, which may result in a form of oversight covering certain American republics. The present arrangements in San Domingo, Haiti, and Nicaragua are cases in point, and such arrangements are obvious solutions of the problems of financial control.

The Monroe Doctrine is not obsolete, and is not likely to become obsolete. It is very unpopular in some parts of Europe. The

United States may be induced to abandon it, but the only form of inducement likely would be a successful war waged against the United States by some European power.

University of Chicago.

HARRY PRATT JUDSON.

**LAW AND ITS ADMINISTRATION.** By Harlan F. Stone. New York: Columbia University Press, 1915. Pp. 232.

In the Hewitt lectures for 1915, Dean Stone essays the difficult task of presenting the lawyer's idea of our law, its meaning, growth, and administration before a lay audience. The substance of those lectures has just been issued in book form by the Columbia University Press under the title, "The Law and its Administration."

A careful reading of the book discloses it to be a clear, concise statement of a conservative lawyer's idea of the meaning of present day law, and the part which the courts, legislators and lawyers play in its administration and development. The direct, clear cut style of the writer is most agreeable and surely the layman will gain a better idea of the lawyer's view of our legal institutions, than is usually conveyed by the numerous writers, who have aspired to explain the law to the public.

The author avoids the philosophic gloss so much in vogue in these days; indeed he states theoretical jurisprudence has had little influence in the actual development and moulding of our legal system. The lectures cover a considerable range, beginning with a chapter on the nature and functions of law in which he distinguishes legal from moral and social rules. Under the heading law and justice, and fundamental legal conceptions, he deals largely with private law, contracts, trusts, property, etc. In discussing the nature of justice, he assents that justice is a relative thing, and not in the legal sense to be defined in absolute terms, since the courts are applying definite rules to concrete cases and justice in the legal sense must mean the accepted usage and custom of a given community, accepted custom or usage meaning that for which there is a legal sanction. The phrase "social justice," he assents is too indefinite to serve as a basis for judicial decision. "It is used in varying senses, perhaps more often as indicating a political theory of social welfare, than any other." Thus it is more appropriately a basis for legislative action. He quotes from a distinguished advocate of the so-called sociological jurisprudence "legal science ought to be founded upon generalizations from a descriptive sociology." Such a principle of judicial decision in the author's opinion would be utterly foreign to the spirit of the common law, and destructive of its essential qualities. The second part of the book deals with constitutional limitations, bench and bar, law reform and thus brings the author into a field where controversy rages. The power of the supreme court to declare legislative action unconstitutional so often challenged and even a matter of political controversy and declaration, he defends as logically and historically sound.



The interpretation of the 14th amendment extending its protection to property is defended, the author adding "Whatever the immediate occasion and purpose of the amendment, it is hardly to be supposed that language so general and unrestricted as that incorporated in our governmental charter should be so limited in its interpretation."

While recognizing the desirability of legislation requiring that the burden of accident in hazardous callings be thrown on the trade rather than the worker, he contends that this sort of legislation contemplates a new conception of property rights necessitating constitutional amendments. The much discussed *Ives* case is defended as a conscientious exposition of this view. That the constitutions can be amended when the demand is real and represents a settled political and social idea is abundantly demonstrated. The constitution is primarily designed to protect the minority against the passion and ephemeral desires of a majority. The recall of judicial decisions is an attempt to place the constitution upon the same level as an ordinary statute.

Most of the evils of our present systems of procedure he attributes to the lowering tone of the bar, due to low standards of admission and tolerance of unprofessional conduct. The bar lacks a professional background, a sense of community of interest which must be remedied if we are to have improvement, the bar must have more of a voice in selecting judges, who should be chosen for their professional standing and not their political availability. The legislature should cease to control procedure, and allow the courts to make the rules best calculated to secure justice.

The author deplores the ever increasing mass of legislation as the prime contributing cause of the mounting difficulties of judicial administration.

In short, a general raising of standards of bench and bar, a larger control of the bench over procedure is the remedy for most existing abuses. The recall of decisions and judges naturally meets with his unqualified disapproval.

The lawyer will find the book a clear and forcible statement of conventional legal doctrine, with which he is familiar; the laymen, who read it, will gain a knowledge of the prevailing professional view of our law and its administration.

University of Wisconsin Law School.

H. S. RICHARDS.

THE ILLEGALITY OF THE TRIAL OF JESUS. By John E. Richards.  
THE LEGALITY OF THE TRIAL OF JESUS. By S. Srinivasa Aiyar.  
New Orleans: Charles E. George, 1914. Pp. 92.

In a book of less than one hundred pages the legality of the trial of Jesus is argued pro and con by John E. Richards, an Associate Justice of the First District Court of Appeals of California, and S. Srinivasa Aiyar, now deceased, but in his lifetime a high court *Vakil* at the Bar of India, and editor of the *Madras Law Journal*. Both write from the jurist's standpoint, Judge Richards taking the affirmative of the proposition, and the Eastern scholar

the negative. Dealing with substantially the same material, they come to opposite conclusions.

Judge Richards, as a writer, would be classed as an orthodox Christian, a believer in the resurrection and the substantial historical accuracy of the New Testament. Mr. Aiyar is a radical, an evolutionist, a believer in higher criticism, and a non-Christian. These two gentlemen have, apparently, been brought together as protagonists of the strictly Biblical and scientific points of view.

To Judge Richard's mind, the trial and condemnation of Jesus was the result of a conspiracy on the part of the Sadducees, under the leadership of Caiaphas, the high priest, the man whom Jesus characterized as "that cunning fox." Judge Richards alleges a number of grounds of illegality, the two most important ones being the holding of the session of the Sanhedrin that tried Jesus under Jewish law in the night time, and continuing its session on the following day, which was the Feast of Unleavened Bread, a *dies non* in Jewish law. The other violation occurred during the trial. Under Jewish law two witnesses were necessary for conviction of a capital offense, and the accused could not be questioned with reference to their testimony. This security of a defendant was violated by Caiaphas, who, while a member of the Sanhedrin, yet seemed to act as an accuser. No opportunity was given to the accused to call witnesses or to defend himself, and without following the regular procedure of voting on the question of guilt or innocence until some member of the court had summed up all that there was to be said in favor of the accused, the high priest put the question, and Jesus was judged worthy of death for blasphemy. As the Sanhedrin did not have the power of life and death, the question had to be referred to the Roman Procurator, Pontius Pilate. Here the accusers of Jesus changed the accusation from blasphemy to that of treason, as the Roman court would not concern itself with the religious disputes of the Jews. Judge Richards shows that Pilate evidently believed that Jesus was innocent of treason to the Roman state and was intimidated by the priesthood and feared he would be reported to the suspicious emperor, Tiberius. In confirmation of this, Judge Richards refers to the dramatic act of Pilate in washing his hands in public and declaring he could find no crime in the accused man.

Mr. Aiyar's paper starts in with a long protestation of freedom from bias, but his argument evidences much of the partisan spirit; yet he is scholarly and brilliant in his analysis and reasoning. He admits that the trial under the Sanhedrin was irregular, but holds that it was set aside when Pilate declared that he found no fault in the accused. The author shows a wide range of reading, not only in religious literature, but in legal literature as well, quoting from Greenleaf, Chamberlayne, the United States Supreme Court and State Reports to sustain his contention on the validity of court judgments. He holds that the court of the Sanhedrin is entitled to the same presumption as is extended to all properly constituted courts, that the proceedings before them are regular,

therefore, that Jesus had all his rights preserved during the trials, both in the Sanhedrin and in the Roman court of the Procurator. He disposes of the objection that the trial took place in the night by claiming that in Judea the rising of the sun during April, when the trial took place, was between 2 and 3 o'clock, and that, therefore, the sessions of the court must have been held in the daytime.

The book contains a translation of the apochryphal work, entitled, "Acts of Pilate," supposed to have been written a century after the events described therein; also a bibliography of many authorities bearing upon the legal procedure of the Jews, the court of the Sanhedrin, and the trial of Jesus.

There are two pictures in the book that seem to be misfits: one is entitled, "Jesus at the time he was sent into Egypt," and represents him as a boy of 12. It is the picture of Jesus in the Temple confuting the Doctors of the Law. The other is supposed to represent Henry Irving as "Pilate in the Judgment Hall." It looks more like the picture of Eugene V. Debs, sitting in his easy chair in his library, than the great English actor.

The book will be found decidedly interesting by lawyers and students of law and by all who wish a judicial, scholarly discussion of one of the great events in human history.

Chicago.

EDWARD T. LEE.

WILLS, EXECUTORS AND ADMINISTRATORS. By James Schouler. Albany: Matthew Bender & Company, 1915. Fifth Edition. Two Volumes. Vol. I, pp. lxxxiii, 862; Vol. II, pp. xci, 863-1734.

At the special request of the present publishers of his condensed, one volume edition of Wills and Administration, the author has reconsidered his decision expressed in the preface to that edition, to round to a close his long and busy professional career with that volume, and has given to the profession and to the law student a fifth edition in two volumes of his original treatises on the law of wills, and on the law of executors and administrators. Schouler's texts need no introduction; they find themselves as a matter of course on the library shelf of law school and law office; the brief writer refers to them and they are cited in well-considered judicial opinions. Undoubted learning, untiring application, years devoted to his task, have brought to Professor Schouler deserved respect and honorable repute. And yet a rather close perusal of the volumes of the fifth edition of his work on Wills, Executors, and Administrators leaves one cold. It is not easy to determine why; it is with deference that criticism is offered.

Contemporary opinion heartily supports the author's preface to his one volume fourth edition. There he points out the cleavage between treatises and digests. The modern machinery of digesting the utterances of courts of final resort has given the practitioner ready access to decisions, to case precedents, in unbroken line, almost down to the day of trial or of brief making. The treatise cannot hope to compete; the text-writer is lost if he attempts this

field for his endeavor. Our author claims as the text-writer's own sphere that of elucidating principles, "to preserve the origin and history of the law, to teach and refresh the mind on elementary principles and to trace the latest development and progress of the particular topic or branch of jurisprudence." Perhaps it is because the treatises under consideration do not, in this reviewer's opinion wholly fulfill the author's set purpose that a want in them of something is felt.

The text moves forward, as it were, by citations of authorities. Rarely does a sentence appear without its reference to a foot-note giving judicial authority for the statement made. The impression given is of a stringing together of statutory and case law, a *quasi*-digest of head-notes, such as is condemned by the author, if his preface above quoted is correctly understood. The limitations upon the text-writer who confines himself absolutely to matters actually adjudicated is apparent. If the treatise is to perform its true function it should differentiate and classify lines of authority; reconcile decisions where possible; point out fallacies; in the author's words, "elucidate principles." This, it is submitted, the work under consideration in large part fails to do. It may be that the very frequent breaks in the text, the distracting references to notes which often are no more than citations of cases, create a wrong impression, but it is believed that there is too much of the digest about these two volumes. In a word, to make clearer what is here meant, suppose we were to refer to, and quote from, the volumes in question. The authority in most instances for the reference and quotation might better be given as the case or cases directly supporting the text than as Professor Schouler. That the case is digested in Professor Schouler's text books adds no more to the authority of the statement than the inclusion of such case in the American Digest.

The reviewer gives his views with deference. The texts reviewed will doubtless have a large sale and extensive use. It is the greater pity that the proof-reading was wretched and the volumes are replete with typographical and various textual errors. If the work under consideration is fairly open to the criticism here suggested, may it at once be added that the treatise which is not to be subjected to like criticism is rare

R. Y. H.

**PROBLEMS OF TODAY—SOCIAL STUDIES AND SUGGESTIONS.** By Cairolì Gigliotti. Chicago: Barnard & Miller, 1913. Pp. 105.

The book under review is composed of essays on a series of more or less unrelated topics, such as "Duty of the Press," "Law and Criminality," "Race Prejudice," "Marriage and Divorce," "The Defense of the Country," etc. The topics here listed are the titles of the first five chapters. There are ten other titles, equally unrelated, making up the whole of a book of one hundred and five pages.

The first query that came to the mind of the reviewer was why such a multitude of topics? In turning to the preface we

are told by the author that the book was not written for "the purpose of placing myself in the lime-light," but because the author desired "to contribute somewhat to the welfare of the country by placing squarely before its best citizens, grouped together, a number of problems which have been, so far, discussed only separately and for which no remedy has ever been suggested." "I have tried to place squarely before the American people not only the results of my observations as to faults and weaknesses of our system but in each and every case I have tried to suggest a remedy."

As might be expected from a treatment of the character indicated above, the book is composed of a number of brief, sketchy essays that no more than touch the problems treated. The matter presented is commonplace and is, in the main, an expression of opinion on some particular phase of the questions considered that happened to have interested the author. Generalizations are made upon this narrow basis. As an illustration, the treatment of "The Monroe Doctrine" is directed toward the Mexican situation, in which the author spends about as much space in commending the rule of Diaz as in treating the topic. But in the present instance he suggests an arbitration commission composed of members representing "each and every government of Central America." In case of disagreement, he would have an appeal to the Supreme Court of the United States for final adjustment. There is no indication that the author has conceived of the problem which he disposes of in this simple manner. The book contributes nothing toward the solution of the problems studied, nor is it particularly interesting. There is no evidence of logical analysis nor of a comprehensive understanding of the problems treated. The author has, in the opinion of the reviewer, distinctly failed to accomplish his purpose "to contribute somewhat to the welfare of the country" by the publication of the book.

Northwestern University.

F. S. DEIBLER.

**THE BOYCOTT IN AMERICAN TRADE UNIONS.** By Leo Wolman. Baltimore: The John Hopkins Press, 1916. Pp. vii and 148.

This work is one of the series of Johns Hopkins University studies in Historical and Political Science. Mr. Wolman does not consider the boycott from the standpoint of the many intricate legal phases of the question, but the work consists principally of a short history of the development of the boycott, its classification, as determined by its nature, purpose and method, and a fairly impartial statement of the arguments advanced by both sides of the controversy as to the morality and practical value of the boycott as ordinarily imposed.

The definitions and classifications of the boycott as laid down by Mr. Wolman present clear analysis, and are of helpful suggestion to a closer study of this important subject. The work is rich in references and illustrations of the multitudinous forms assumed by the different kinds of boycotts.

Though the author makes a very conscious effort to present the subject impartially, we cannot but feel that he assumes practical benefit to the public from the organization of trade unions, and with this assumption he concludes that the boycott is a necessary aid to the building up of unions in unorganized trades by the assistance of outside unions where the workmen themselves are disinclined or unable to effect a compact organization without such material aid.

He calls attention to the important restriction of the activity of labor unions through the boycott as brought about by the decisions of the Supreme Court in the *Buck Stove* case, and in the *Danbury Hatter's* case, which have been productive of the present widespread agitation for Federal and state legislation which will result in removing such disabilities.

Chicago.

ALBERT N. MERRITT.

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# ILLINOIS LAW REVIEW

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## CONFUSED SOVEREIGNTY<sup>1</sup>

By GEORGE W. WICKERSHAM<sup>2</sup>

"Under which King, Bezonian?"—2 Hen. IV.

The establishment of the so-called "federalized militia" sought to be accomplished by the "oath and contract of enlistment" required of members of the National Guard of the several states, by the act of Congress approved June 3, 1916, and the other provisions of that statute, presents, in a peculiarly striking manner, the confused nature of American sovereignty, as it finds expression in the modern development of state and federal institutions. The sovereign is said to be the person, body, or state in which independent and supreme authority is vested. A sovereign state, according to the accepted definition, is one which administers its own government and is not dependent upon or subject to another state. Neither before nor since the adoption of the constitution of the United States, has this definition rightly described either a state of the American union, or the federal government itself. Professor Hurd correctly says that it is

"Contrary to the facts to suppose that, at any time since the separation of the thirteen colonies from the Empire of Great Britain, a corresponding number of states have existed in their places; each possessing, in severalty, the sum of sovereign powers belonging to every independent state or nation, and capable of severally ceding all, or a portion of those powers to any person who might be capable of receiving them.

"It is contrary to the facts to suppose that thirteen colonial *governments* acquired, each for itself, within its original jurisdiction, any of those powers which the imperial government had before exercised therein, or, generally, that they acquired any sovereign rights whatever."<sup>3</sup>

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1. An address delivered before the National Association of Attorneys-General at Chicago, 28 August, 1916.

2. Of the New York Bar. Former Attorney-General of the United States.

3. *John C. Hurd*, "The Theory of Our National Existence," Little, Brown, and Co., Boston, 1881, p. 123.

The term *sovereign rights* is here used in its application to the relation of one political state to another. As respects the relation between a state and its citizens, sovereignty implies the existence of the power to make laws binding upon all people within the jurisdiction of the state. When Hamilton wrote in the *Federalist*<sup>4</sup> that "A law, by the very meaning of the term, includes supremacy," he was doubtless thinking of Blackstone's definition of law—"A rule of civil conduct, prescribed by the supreme power in a state \* \* \*." So, in the search for sovereignty, the first inquiry is for the law-making power, and in the American commonwealth this power is multiple, not single; confused and conflicting, not clear and undisputed.

The declaration of their independence of Great Britain was made by representatives of thirteen colonies, all of which were subject to the parent government, no one of which ever had possessed in theory, nor in practice exercised, either over its own inhabitants or with respect to other states, anything approaching sovereign power. Together, in loosely fashioned union, but yet united in a manner that to the other nations presented but one sovereign power, for seven years they waged war against Great Britain and during four more years maintained a precarious and inefficient national existence, until a universal recognition of the need of stronger government, to be attained only through more perfect union, led to the adoption of a new constitution in 1787.

The scheme of government embodied in this instrument represented the best thought of the wisest men of the day, so far as the narrow prejudices and fettering traditions of provincial communities permitted its expression. It was based upon a frankly expressed principle of divided sovereignty. It was a compromise of the ideals of nationality with the prejudices of locality.

"In the first place," wrote Madison in the *Federalist*,<sup>5</sup> "it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments"—note the adjective—"the subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity."

The framers of the constitution by this method hoped to realize the kind of constitution extolled by Montesquieu; one "that has

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4. No. XXXIII.

5. No. XIV.



all the internal advantages of a republican, together with all the external force of a monarchical government."<sup>6</sup> This constitution was not adopted by the states in their organized political capacity. It did not rest, as do treaties between independent powers, upon an exchange of ratifications between their respective executives or law-making bodies. Hamilton declared, "the fabric of American empire ought to rest on the solid basis of the *consent of the people*. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."<sup>7</sup> "Political independence, or the possession of sovereign power," says Mr. Hurd, "is a fact, determined by manifestation of force or power to hold sovereignty, or to be independent." The preamble of the constitution declared that "We the people of the United States," not "We the several states of the American Federal Union," "do ordain and establish this constitution for the United States of America." This recital stated the historical fact; a fact which eighty years later was declared by Chief Justice Chase in the following language:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence. \* \* \*

"Both the states and the United States existed before the constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the states. But in many articles of the constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left to them and to the people—all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the *Federalist*, thus: 'The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes!'"<sup>8</sup>

To insure the paramount character of the union, the supremacy over the subordinate states referred to by Madison in the paragraph above quoted, the people, in the federal constitution declared that "this constitution and laws of the United States which shall be made in pursuance thereof \* \* \* shall be the supreme law of the land; and the judges in every state shall be bound there-

6. *Federalist*, No. IX.

7. *Ibid.*, No. XXII.

8. *Lane County v. Oregon*, 7 Wall. 71: Chase, C. J., p. 76.

by, anything in the constitution or laws of any state to the contrary notwithstanding." One more thing was essential in order that the respective depositaries of parts of the sovereignty of the people should be restricted to their particular and designated functions, and the anomalous system made workable. That was, the establishment of a national judiciary, invested with power to decide all cases of conflict between state and national authority—a judiciary, placed by life tenure beyond the undue influence of either state or nation or popular clamor; invested with jurisdiction over all cases and controversies arising under the constitution and laws of the United States. This has been recognized as "a political experiment without precedent." It was the greatest contribution ever made to the science of government. Today it furnishes a principle for the solution of the problems of international relations in the future; the only principle in which the world sees a hope of protection from the constant menace of militarism. Without it, the partition of the people's sovereignty between state and nation would have been a mockery. Even despite it, the impairment of that jurisdiction, through the popular prejudices in recent times excited against any judicial restraint upon democratic impulse to legislate, is resulting in a confusion of ideas which threatens to break down all principles governing the separation of the functions of state and nation, to blur the confines of those "proper spheres," within which, as Chief Justice Chase said, "the independent authority of the states is distinctly recognized," and to leave the determination of the respective jurisdictions of state and nation to the counsels of temporary expediency, uncontrolled by constitutional principles, and unrestrained by the power of impartial judicial arbitration.

For these reasons I have thought this a fit and timely occasion to invite attention to the growth of an alarming and increasing confusion of ideas of sovereignty, and the abandonment of respect for, or adherence to constitutional limitations upon the exercise of national and state sovereignty. It is trite to say that the government of the United States is one of enumerated powers and that the powers not expressly granted to it by the constitution are reserved to the states respectively or to the people. Within the scope of the granted powers, which includes not only those expressed, but all powers necessary or proper to their exercise, the sovereignty of the union is declared to be supreme; yet the exercise of these powers

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9. *Hurd*, *Op. cit.*, p. 85.

by the congress has been halting and inconsistent, often lacking in vigor and completeness, and too often characterized by those dismal companions of democracy so eloquently described by Émile Faguet, namely: the culte of incompetence, and the dread of responsibility.

The failure of Congress to enact any law for the enforcement of treaty obligations, naturally arises as one of the most striking examples of this characteristic. Under the constitution, foreign nations must deal with the national government alone, and can enter into no direct relations with a state. Yet when a state legislates directly in the teeth of a treaty obligation assumed by the United States, our executive government is put in the humiliating attitude of answering complaints of such action by pleading its impotence to control the state. The power of Congress over the subject is undoubted, and there is no valid excuse for its failure to enact legislation appropriate and adequate to punish and thus prevent the violation of treaties. Yet every effort to secure such legislation has failed of accomplishment.

A more striking demonstration of inconsistency is afforded by the history of the exercise by Congress of that vast jurisdiction comprehended in the grant of power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." More than to any other one cause, the recognition of the need of a "more perfect union" was the result of interference with commercial intercourse among the states, by conflicting legislation under the Confederacy. A very brief experience of that clumsily organized government made it manifest that the repository of national sovereignty, the power to make laws affecting those matters "that concern all the members of the republic," must include a comprehensive control over commerce—interstate and international. Despite the breadth of the definition of this power formulated by Chief Justice Marshall in *Gibbons v. Ogden*,<sup>10</sup> it was not until after the close of the Civil War, in 1866, that Congress exerted it to protect the conduct of commerce over railways between the states from just such hindrances as, with respect to water-bound commerce, gave rise to that great decision.<sup>11</sup>

By the Interstate Commerce Act of 1887, Congress exercised in the interest of shippers and passengers a regulatory power over rates and practices of interstate railroads, but that power was only made effective by the passage of the Hepburn Act in 1906. Since that date have come in rapid succession various national statutes

10. 9 Wheat. 1.

11. Act June 15, 1866, 14 Stats. 66.

for the protection of the lives and persons of passengers and employees on interstate railroads, through the regulation of the character, and maintenance of equipment and other facilities, and by securing to employees engaged in interstate commerce compensation for injuries received in the line of their employment without regard to common law restrictions upon the liability of employers, and provisions for the settlement by arbitration of differences between the carriers and their employees. The Supreme Court has given the widest possible application to these measures. In the *Minnesota Rate Case*,<sup>12</sup> it declared the exclusive character of the power over rates of transportation in interstate commerce vested by the constitution in the Congress, and the impotence of the states, directly or indirectly to interfere with the fullest exercise of that power. In a very recent case, an employee of a railroad company, injured by reason of a defect in an appliance of a car which was sometimes employed in interstate commerce, although not so used at the time of the injury to the plaintiff, was held entitled to recover damages under the federal Safety Appliance Act.

"In the exercise of its plenary power to regulate commerce between the states," said the court, speaking by Mr. Justice Pitney, "Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject matter is excluded. \* \* Without the express leave of Congress, it is not possible, while the federal legislation stands, for the states to make or enforce inconsistent laws giving redress for injuries to workmen or travelers, occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them."<sup>13</sup>

The power also has been used to justify federal regulations of a police nature, such, for instance, as prohibiting the carriage in interstate commerce of diseased cattle, or lottery tickets, or adulterated or misbranded foods or drugs, or women for immoral purposes; to prevent and punish contracts, conspiracies, and combinations in restraint of such commerce and attempts to monopolize the same or any part thereof; and laws prohibiting railroad companies from carrying in interstate commerce any commodity manufactured or produced by them and owned by them at the time of such transportation. The decisions of the Supreme Court which sus-

12. 230 U. S. 352.

13. *Texas & Pacific R. R. Co. v. Rigsby*, 241 U. S. 33; cf. *Shanks v. D. L. & W. R. R.*, 239 U. S. 556.

tained the constitutionality of the lottery and the white slave statutes, have opened new vistas for the extension of federal power in the domain of what is called social justice. If Congress may lawfully forbid the carriage in interstate commerce of lottery tickets or cinematographic films of a libidinous character, because of their injurious effect upon public morals, why it is asked, may it not forbid the transportation of any article or person whenever in the opinion of Congress such transportation would be injurious to the public morals or welfare? This contention very recently was relied upon to justify a bill which passed the Senate a few days ago by a vote of 52 to 12—similar in purport to, although differing in language from, a bill previously passed by the House of Representatives, enacting, with appropriate penalties,

"That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom, children under the age of sixteen years have been employed or permitted to work, or any article or commodity, the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work, more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock post meridian, or before the hour of 6 o'clock ante meridian."

This bill pushes the power to regulate interstate commerce into a domain far beyond anything that hitherto has been recognized as embraced within even that extensive field.

"Commerce," according to the classical definition of Chief Justice Marshall, "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."<sup>14</sup> Manifestly, as Mr. Justice Harlan said in the *Adair* case,<sup>15</sup> "any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress, under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated." But, as that great judge queried with respect to the relation of commerce to membership by a railroad employe in a labor union, what possible legal or logical connection is there between the hours of employment of minors in

14. *Gibbons v. Ogden*, 9 Wheat. 1, 138.

15. 208 U. S. 161, 178.

a manufactory or mine and the carrying on of interstate commerce in the products of that mine or factory or the conduct of interstate commerce in any other commodity by the owner of such mine or factory?

Senator Brandegee of Connecticut, during the course of his admirable analysis of the constitutional limitations overridden by this bill, said:

"I think all the states in my section of the country have what everybody admits to be proper child-labor laws. They are enforced. There is no complaint there about their operation. The people are intelligent and the children are well cared for. The mills and factories are sanitary and are under state inspection. That is true, I assume, of by far the largest part of the country. There may be here and there, in a few of the states, mills and mines or other places where children work which are not properly inspected, and several which do not have sufficiently strict child-labor laws; but it must be remembered that even in those places the question is one of opinion and degree, and the circumstances differ, of course, in different parts of the country."<sup>16</sup>

The argument of Senator Overman<sup>17</sup> against the constitutionality of the bill seems to me unanswerable. It was not met in the discursive addresses of other senators. One of the most earnest supporters of the measure, Senator Kenyon of Iowa, frankly confessed to grave doubts as to its constitutionality.<sup>18</sup> Yet on the final vote in the Senate only twelve senators, two Republicans and ten Democrats, were recorded against the bill.

At the date of this writing, both of these bills are in conference, and the legislation in some modified form undoubtedly will be placed upon the national statute book.<sup>18a</sup> If its constitutionality shall be upheld by the Supreme Court, there would seem to be no subject of internal state concern which may not become the subject of national legislation through the exercise of the power to regulate interstate commerce, and the states will have been reduced to the political condition of mere counties or other municipalities. The most discouraging feature of the whole matter is, that because the humane sentiment of all right thinking people condemns the premature employment of young children in laborious pursuits, public sentiment also condemns and public clamor has almost silenced any opposition to the employment of national legislation in a field which

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16. Cong. Rec., Aug. 7, 1916, p. 14188.

17. *Ibid.*, pp. 14159-66.

18. *Ibid.*, p. 14180.

18a. The bill was passed by both houses of Congress and approved by the President, September 1, 1916, in substantially the language above quoted.

is wholly outside of the proper national functions and can only be reached by a sophistical extension of the constitutional grant.

The reproof of Senator Brandegee fell upon unheeding ears. In closing his remarks in opposition to the bill, he said:

"I do not know what the Supreme Court will say about this bill now; but if we are going to pass up everything to the Supreme Court, shirk all our responsibility in the matter, and vote for measures that we think are unconstitutional, or that we think ninety-nine chances out of one hundred are that they are unconstitutional, I do not think we are treating the Supreme Court fairly. The Supreme Court of this country ought to have some support; but if we are constantly going to throw upon the Supreme Court all the responsibility of setting aside acts we thought were unwise but that we passed in response to public clamor, we are, to a certain extent, depriving the Supreme Court of its right to have the support of a co-ordinate branch of the government in trying to maintain the constitution of the United States. \* \* \* \* Mr. President, if the Senate of the United States would do its duty as it sees it, and have the courage of its convictions, we should not have so much demagoguery in this country, there would be more respect for the courts, and, in the long run, there would be more respect for Senators and Representatives in Congress."<sup>19</sup>

While the power over interstate commerce has been carried to these lengths in the directions indicated, in some other respects its exercise has been timid in the extreme.

In the case of the transcontinental railways, shortly after the civil war, Congress with the approval of the Supreme Court, exercised its power to erect corporations to carry on interstate commerce. In each instance, however, this was done by the passage of separate acts, each creating one particular corporation—the Union Pacific, the Northern Pacific, the Atlantic and Pacific, and the Texas Pacific Railroad Companies being the principal examples. Yet so narrow and restricted were the powers in these instances granted to the corporations named, and so unadapted to their growth and development, that all of those companies have been compelled to reorganize under state charters, with the single exception of the Texas & Pacific Company, while that corporation, by a recent statute, has been deprived of what seemed to be the only remaining advantage of its federal charter, namely, the right of removal of actions brought against it into the federal courts.<sup>20</sup>

Great and increasing powers of control over the operation of interstate carriers have been exercised by Congress, with an infinitude of definition of things they are forbidden to do, while similar

19. *Ibid.*, Aug. 4, 1916, p. 13985.

20. See Act of Jan. 28, 1915 (38 Stats. 804, c. 22, Sec. 5). *Bankers Trust Co. v. Texas & Pacific Railway Co.*, 241 U. S. 295.

powers also have been exerted over them by state legislatures, through commissions exercising legislative and *quasi* judicial, as well as executive control. This has resulted in confused and conflicting regulations which often are almost impossible to comply with as respects one state, without danger of disobedience to another. Thus far, Congress has shrunk from a full recognition of the responsibility that ever should accompany power, and has refrained from adopting a practicable scheme of corporate organization to protect those engaged in carrying on commerce among the states from the waste and confusion resulting from the conflicting requirements of a dozen or more separate sovereignties, often prescribed without regard to any but local conditions, and frequently in entire disregard of those larger questions which, to repeat Madison's descriptive phrase, "concern all the members of the republic, but which are not to be attained by the separate provisions of any."

The nature and scope of the powers of a corporation engaged in the operation of a railroad traversing several states, a business almost wholly interstate; the regulation of its stock and bond issues; the powers and duties of its directors and officers;—all these should be determined by the one power which can embrace and control the whole system, and not be left to the differing requirements of the several states through which it passes. So with respect to the general conduct of other forms of interstate commerce. They too are exposed to the constant efforts of the states to subject them to taxation, which, while the Supreme Court always interposes to protect against when, "looking through forms and reaching the substance of the thing" the tax imposed appears in reality to be "a tax upon the right to do interstate business within the state, and an undertaking to tax property beyond the limits of the state,"<sup>21</sup> yet often crowd the principle of state control dangerously near the limit; as was done in the case from which I have just quoted. The Supreme Court reports are filled with decisions upon these questions of taxation, many of which would be entirely removed if Congress, within the scope of its undisputed powers, were to address itself to the enactment of a suitable general incorporation law for the creation and government of corporations for the conduct of various forms of interstate commerce.

It is directly within the constitutional power and duty of Congress to furnish this relief. If the power to regulate commerce among the states warrants a national prohibition of all agreements

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21. Hughes J. in *Kansas City Railway v. Kansas*, 240 U. S. 227-234.



to restrain that commerce, how much the more does it confer the power to promote agreements to carry on such commerce under proper conditions, with limited liability, through charters of national incorporation?

There is another tendency in congressional legislation in the exercise of the power to regulate interstate commerce, which presents a contrast of centripetal force directly opposed to the centrifugal expansion of national power exhibited in some of the instances above enumerated. I refer to the legislation concerning the liquor traffic. The great chief justice in defining the scope of this power, laid down the principle in *Brown v. Maryland*,<sup>22</sup> that the jurisdiction of Congress extends not merely over shipments from one state to another, but envelops with its protection any article of merchandise in the original package in which it entered the state, until that package was broken. That is, the sale of the original package by the importer to a state purchaser was declared to be within the power of Congress to protect against state regulation. When the wave of sentiment against the use of intoxicating liquors began to find expression in prohibitory legislation in different states, this federal protection of the original package was resorted to as a means of evading the prohibition of state laws, and state resentment at this use led to the passage of the Wilson bill in 1890<sup>23</sup> which withdrew federal protection from the package after its receipt by the original consignee, and left its sale by the importer subject to state regulation or prohibition.

This was sustained in the Supreme Court as constitutional, upon the ground that the sale of the original package by the consignee was not directly interstate commerce, but merely a *consequence* of it, and that while Congress might exercise power over that consequence, it was optional with it to do so or not.<sup>24</sup> The Webb-Kenyon law, enacted in 1913,<sup>25</sup> went further than the Wilson Act and declared it to be unlawful to ship from one state into another intoxicating liquor which is intended by any person therein to be received, possessed, sold, or in any manner used, either in the original package, or otherwise, in violation of the laws of that state. That is to say, while recognizing that in general it is lawful to traffic in liquor<sup>26</sup> and imposing taxes by which the federal govern-

22. 12 Wheat. 419.

23. 26 Stats. 313.

24. *In re Rahrer*, 140 U. S. 545; *Rosenberger v. Pacific Express Co.*, 241 U. S. 48.

25. 37 Stats. 699.

26. *Louisville & Nashville R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70; *American Express Co. v. Iowa*, 196 U. S. 133; *Kirmeyer v. Kansas*, 236 U. S. 568.

ment derives large revenues from the manufacture and sale of intoxicants, Congress nevertheless declared that if the law of a particular state forbade that traffic, it should be unlawful for any one to ship, or for a railroad to carry liquor into that state.

This enactment involved, not merely the surrender of control over an *incident* of interstate commerce, but the surrender of a portion of the direct power to regulate commerce devolved upon Congress by the constitution. The constitutionality of this act has not yet been passed on by the Supreme Court, although it has been sustained in a number of inferior courts. The states have not been slow to exercise the authority thus sought to be conceded to them. An interesting and exhaustive review of this legislation, including statutes of West Virginia, North Carolina, Kentucky, Mississippi, Arizona, Tennessee, Texas, Delaware and Virginia will be found in an article by Mr. Lindsay Rogers in the *Virginia Law Review* for April 1916.<sup>27</sup>

The particular provisions of those statutes which Mr. Rogers especially criticises, are sections which attempt to limit the amount of liquor a person may obtain from without the state for his personal use, to compel carriers to keep a public record of all shipments and to prevent the advertisement of intoxicating liquors by price lists sent through the mails. It would be foreign to the purpose of this paper to enter into a discussion of the merits of these questions. Reference is made to the subject merely as a striking example of legislation resulting from confused ideas of sovereignty; on the one hand, an attempt by Congress to abdicate a clear constitutional power vested in it and in effect to delegate a portion of its own legislative powers to the states; and, on the other hand, the exercise by the states of that power, not only to the fullest permitted extent, but far beyond even the limits of the delegated jurisdiction. In this instance, both national and state legislatures alike have ignored the constitutional limitations on their respective powers, and each has invaded the orbit of the other.

For the most part, however, the inclination of Congress is to extend, not to restrict, its jurisdiction. This tendency is increasing, and the enactments of the past two or three years, as well as presently pending measures, furnish striking illustrations of this tendency. It may be profitable to analyze three or four of the most con-

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27. "The Virginia Prohibition Law and the Commerce Clause of the Federal Constitution" by *Lindsay Rogers*, *Virginia Law Review*, April 1916, p. 483, et seq.

spicuous examples of this character. The Child Labor Bill already has been discussed.

The Federal Reserve Act of December 23, 1913, not only draws within the control of the Federal Reserve Board at Washington all the banks incorporated under the national Banking Act, but seeks also to embrace all state banking institutions as well, and very recently the Board has even sought to enlist the services of the Post Office Department as a collecting agency of drafts and checks upon state institutions held by banks in the federal reserve system, thus ousting state banks and trust companies from a profitable business which ought to be secure from governmental competition. Not only did Congress by this Reserve Act endeavor to establish national control over the banking of the country, national and state, but it assumed to confer upon national banks the power to act as executors, administrators and trustees of estates—powers which have no relation to national banking, except possibly to strengthen the national banks as competitors with state institutions. It would seem to be just as much within the proper function of Congress to empower the national banks to conduct department stores, so as thereby to increase their facilities for securing deposits. Two states have held these provisions unconstitutional.<sup>28</sup> They have yet to be passed upon by the federal courts.

Again, the Farm Loan Act, passed by Congress in July, 1916, contains a scheme of federal incorporation of joint-stock land banks of very doubtful constitutionality. These banks are to be private bond and mortgage companies with minimum capital stocks of two hundred and fifty thousand dollars, authorized to be formed by ten or more natural persons for the purpose of lending money on the security of agricultural lands within the states in which they are established, and in states contiguous thereto. They are to be private corporations conducted for profit. The United States is to hold none of their stock and is not to participate in their management. Yet, they are authorized to borrow money and issue bonds to a sum not exceeding fifteen times the amount of their capital and surplus, and these bonds are declared by the act to be "instrumentalities of the government of the United States," and are made lawful investments for fiduciary and trust funds, and security for public deposits. Member banks of the Federal Reserve System may buy and sell them. With certain restrictions they may be bought and sold by federal reserve banks. Mortgages executed to such joint

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28. *Appeal of Woodbury* (N. H.), 96 Atl. 299; *People ex rel. Bank v. Brady* (Ill.), 110 N. E. 864.

stock banks are declared to be exempt from federal, state, municipal and local taxation. Just what provisions of the constitution are supposed to justify this legislation was not made clear in the congressional debates.

The authority of Congress to authorize the formation of corporations whenever it might be convenient to the exercise of any of the powers granted to it by the constitution, never should have been seriously doubted by any candid student of the constitution, since Alexander Hamilton's celebrated opinion to President Washington<sup>29</sup> asserting the constitutionality of the act creating the first United States bank. But to authorize the creation by private individuals of banks, with power to carry on in corporate form within the states the business of lending money on mortgage, and to issue bonds which shall be "instrumentalities of the government of the United States," merely because Congress so declares, not because the United States has anything to do with their business or is responsible for the payment of the bonds, and to seek to exempt the property of these institutions from the burdens of state and local taxation, exhibits on the part of Congress an indifference to constitutional limitations, and an utter disregard of state sovereignty, which contrasts strangely with its tenderness with respect to the formation of corporations for the conduct of interstate commerce, or the regulation of the liquor traffic. These provisions certainly will be challenged in the courts and their constitutionality subjected to judicial determination.

Much more subtle and dangerous to the preservation of constitutional limitations, because less likely to be objected to by state authorities, or the people of the localities affected, are such measures as, the bill<sup>30</sup> recently passed in the United States Senate without a dissenting vote, providing for national aid for state vocational education. The plan of that bill, as explained by its sponsor, Senator Smith of Georgia, "is through capable leadership and some contribution, to promote vocational instruction throughout the states;" and, as if to reassure and suppress an anticipated opposition as to the Greeks bearing gifts, he added, "It in no sense is contemplated that the final responsibility for the work shall be removed from state authorities."

The object of this bill is to aid in the education of boys and girls over fourteen years of age, "with a view of extending their vocational knowledge, and extending the vocational intelligence of the

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29. 23 February, 1791.

30. Senate 703.

pupils." The states availing of this aid are to create boards with which the national board shall deal. The state boards are to formulate plans for the administration of the grants in conformity with the provisions of the federal statute, which plans must be submitted to the federal board for its approval. The states respectively must expend an amount equal to that advanced by the federal government. The appropriations made by the bill are divided into four heads:

"First, For the salaries of teachers, supervisors, and directors of agriculture.

"Second, For the salaries of teachers of trade and industrial subjects.

"Third, For the training of teachers of agricultural, trade and industrial, and home economic subjects

"Fourth, For the work of the federal board for vocational education."

The appropriations in the bill for the first year amount to \$1,700,000, and they are increased annually until 1924 when they will amount to \$7,200,000.<sup>31</sup>

If the federal government is to assume one-half the cost of maintaining vocational schools for children in the different states, it hardly can escape the pressure to extend pecuniary aid to other and equally meritorious branches of education; and if the national government shall assume and carry one half the burden of educating the children of the states, build automobile and wagon roads, provide moneys to repair damages resulting from fires and flood, prescribe, and through its control over interstate commerce, enforce rules governing child labor, the hours and conditions of female labor (and why not labor in general?) what will be left of the principle of divided sovereignty so laboriously and carefully formulated in the constitution? Will not the states have been reduced to the condition of mere municipalities, and the federal government have acquired practically an unlimited and unrestricted sovereignty over the states and their inhabitants? Yet it has been declared by the highest authority

"That the preservation of the states, and the maintenance of their governments, are as much within the design and care of the constitution as the preservation of the union and the maintenance of the national government. The constitution, in all its provisions looks to an indestructible union, composed of indestructible States."<sup>32</sup>

31. See Congressional Record, 31 July, 1916, pp. 13753-4.

32. Chase, C. J., in *Texas v. White*, 7 Wall. 700, 725.

As Mr. Justice Swayne, speaking for the court, said in another case:<sup>33</sup>

"The states are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their allotted work."

Doubtless the power of taxation to pay the debts "and provide for the common defense and general welfare of the United States," is vast and incapable of exact definition; but if the states of the union are to retain a semblance of their boasted sovereignty; if they are to rightly perform the functions for which they exist, they must resist the seductive grants of national aid which entail the abdication in favor of the national government of state control over subjects which are peculiarly those of state responsibility, and not aid in the too easy course of centralization of power in Washington, in cases where even if it can be justified in the face of constitutional objection, it is neither within the correct principles of the distribution of sovereignty, nor can the power so well be administered from the national capital as by the people of the localities especially affected.

But this paper was inspired by and opened with a reference to the confused ideas of sovereignty exhibited in the army reorganization bill approved June 3, 1916.<sup>34</sup> It seems fitting that it should close with a consideration of that much discussed measure.

The constitution empowers the Congress to raise and support armies and maintain a navy, to make rules for the government and regulation of the land and naval forces; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. These powers are unlimited, except that it is provided that no appropriation of money for the use of armies should be for a longer term than two years.

The provisions relating to the militia—that is all the adult male citizens capable of bearing arms—were framed on a different theory. The primary control was there recognized as properly in the state governments. Congress was empowered to provide for calling out the militia for three purposes only, (1) to execute the laws of the Union, (2) suppress insurrections, and (3) repel invasion.

With these limitations, Congress further was authorized "to

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33. *White v. Hart*, 13 Wall. 646, 650.

34. "An Act for making further and more effectual provision for the national defense, and for other purposes." Public No. 85 (64th Congress).

provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the states respectively*, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." This provision was admittedly a compromise between the advocates of national control and the states rights party. The standing army was to be exclusively under national jurisdiction. Congress might make provision for the organization and discipline of the militia and prescribe the rules or discipline for their governance. But the officers must be appointed by the states, and the authority of training them according to the rules prescribed by Congress remain with the states. They were made subject to call into the national service for the three designated purposes only, and Congress was empowered to make provision for their government only "while in the service of the United States."

The need of a regular permanent military establishment even in times of peace was pointed out by Hamilton in the *Federalist*.<sup>35</sup>

"Previous to the revolution," he said, "and ever since the peace, there has been a constant necessity for keeping small garrisons on our western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians. These garrisons must either be furnished by occasional detachments from the militia, or by permanent corps in the pay of the government. The first is impracticable; and if practicable would be pernicious. The militia would not long, if at all, submit to be dragged from their occupations and families to perform that most disagreeable duty in times of profound peace. And if they could be prevailed upon or compelled to do it, the increased expense of a frequent rotation of service, and the loss of labor and disconcertion of the industrious pursuits of individuals, would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as ruinous to private citizens. The latter resource of permanent corps in the pay of the government amounts to a standing army in time of peace; a small one, indeed, but not the less real for being small."

The dual control over the militia has proved a source of weakness in every war in which we have been engaged. Our history is replete with instances which demonstrate the costliness of the system, in low efficiency, resulting in needless waste of life and treasure. When, therefore, the necessity became manifest of some adequate preparation for contingencies such as the world war has demonstrated might happen even to this favored nation, the War Department advocated an increase of the regular standing army, and the creation of a body of national reserve troops, subject only to

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35. No. XXIV.

federal jurisdiction, as the first line of defense, after the regular army, leaving the organized state militia to be called upon only for the specified constitutional purposes, in an emergency of a character so serious that the regular army and the federal reserve should be inadequate to cope with it.

Unhappily, political considerations prevented the carrying out of this project, and Congress hit upon a plan of creating what is denominated a "federalized militia," which, so far as ingenuity might devise, despite the constitutional restrictions mentioned, was to be brought under a direct federal control. The force underlying this system, as with the "good roads" and the "vocational educational" measures, was the distribution of federal moneys.<sup>36</sup> The militia of the United States is by the act divided into three classes, the national guard, the naval militia and the unorganized militia.<sup>37</sup> Elaborate provisions are made for the organization of the national guard in each state. The president is authorized to assign the national guard of the several states to division brigades and other tactical units, and to detail officers, *either from the national guard or the regular army to command such units.*<sup>38</sup> This, despite the constitutional provision reserving to the states the appointment of officers of the militia! Provision is then made for every member of the organized national guard of the several states and territories to enter into what is called an "enlistment contract and oath" whereby he is made to acknowledge,

"To have voluntarily enlisted this ..... day of ....., 19.., as a soldier in the national guard of the United States and of the state of ..... for the period of three years in service and three years in the reserve under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of ..... and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the Governor of the state of ..... and of the officers appointed over me according to law and the rules and articles of war."<sup>39</sup>

No man, we have been told, can serve two masters; for either he will love the one and hate the other, or he will forsake the one and cleave to the other. But the Congress of the United States assuming a wisdom in the scorn of consequence, has put every member of the organized states militia in this perplexing and anomalous

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36. See Sec. 67.

37. Sec. 57.

38. Sec. 64.

39. Sec. 70.



position. A perusal of Sections 70 to 119 of the Army Reorganization Act presents countless problems in confused sovereignty which will be read with a bewilderment only relieved by the gratifying declaration in Section 117 that,

"The provisions of this Act in respect to the militia shall be applicable only to militia organized as a land force, and not to the Naval Militia \* \* \* \*"

The constitution reserves to the states respectively the appointment of the officers of the militia, but Section 74 of the Army Reorganization Act undertakes to prescribe the classes from which alone such appointments shall be made, while Section 76 declares that all vacancies occurring in any grade of commissioned officers in any organization in the military service of the United States and composed of persons drafted from the national guard under the provisions of this act, shall be filled by the president.

Certainly, so far as this latter provision applies to the national guard as such while in the service of the United States (which is the only national guard in the act made a part of the army of the United States),<sup>40</sup> this is directly contrary to the constitution. Section 78 provides for the organization in each state of a "national guard reserve" to "consist of such organizations, *officers*, and enlisted men as the president may prescribe \* \* \*," without any pretense of respect for the constitutional authority of the states. It is true that Section 111 seeks to avoid the dilemma created by the provisions just cited, by declaring that when Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the regular army, the president may draft into the military service of the United States \* \* any or all members of the national guard and the national guard reserve, and "all persons so drafted shall, \* \* \* stand discharged from the militia" and become subject to laws relating to the volunteer army. It is upon this metamorphosis that the constitutionality of the entire act, so far as it applies to the use of the national guard as a federal organization in time of war, must finally rest.

The constitution furthermore reserves to the states respectively, "the authority of training the militia according to the discipline prescribed by Congress," but section 92 of this act requires the national guard in each state to assemble for drill, instruction, etc., a prescribed number of times, unless excused by the Secretary of

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40. Sec. 1.

War. Sections 94 and 95 provide for annual encampments, maneuvers or other exercises "under such regulations as the President may prescribe," and, if they are had in conjunction with troops of the regular army, the commander of the latter troops shall command the whole, without regard to the rank of the national guard officers.

Notwithstanding the scope of the "oath and contract of enlistment" above referred to, the Judge Advocate General of the army has ruled,

"That the national defense act contemplates that the National Guard shall be available for service, either as a National Guard called into the service of the United States *as such* for the three constitutional purposes, or, when specially authorized by Congress, as a national force, supplementing the Regular Army and available for any service for which regular troops may be used. In other words, the National Defense Act gives the Government the right, in return for the expenditure for pay, training and equipment of the National Guard, to draft them into the federal service to supplement the Regular Army, but this right can be exercised only when Congress shall have authorized its exercise, as has been done in the joint resolution of July 1, 1916."<sup>41</sup>

The Judge Advocate General has expressed the opinion that as the President has not yet exercised the power conferred upon him by Joint Resolution of Congress on July 1, 1916, to draft the national guard into the federal service, the status of the guard now on duty on the Mexican border in Texas,

"Is that of militia called into the service of the United States for one of the purposes specified in the Constitution—that is, to protect the United States against invasion. While in such service, they are subject to the laws and regulations governing the Regular Army, so far as applicable to their temporary status, and are subject only to the orders of the President. They are not, while in such service, under the jurisdiction of the states, nor are they subject to the orders of the governors, whose authority over them for the time being is suspended, *except only with respect to the appointment of officers.*"

The last mentioned fruitful source of weakness and inefficiency in all past history is thus preserved by this "federalized militia" act. The "oath and contract of enlistment" does not *ex proprio vigore* override the constitution of the United States. As to the process of lightning-like transformation from the status of militiaman to that of federal soldier, when the President waves his drafting wand under section 111 and the joint resolution of Congress, that remains to be weighed in the judicial balance.

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41. Memorandum for the Secretary of War, July 29, 1916. Judge Advocate General U. S. A.: Cong. Rec., Aug. 2, 1916, pp. 13908-9.

The authority of the national government in the exercise of its power to raise armies to compel by draft any able bodied citizen of the United States into the military service for purposes of national defense or aggression, may not be doubted since the draft acts passed during the Civil War. The position of the War Department is undoubtedly sound, that a member of the organized national guard or state militia, equally with every other citizen, is liable to draft, and that the national government may draft into the federal service not only individuals but organized bodies of individuals, constituting at the time of the draft part of the organized militia or national guard of the state.

But it is extremely doubtful whether or not a promise or contract or even oath of a member of a state national guard to hold himself liable for a term of years to respond to a call into the federal military service, can be enforced *in personam*. As the War Department holds, until the national guard is called into the federal service, the status of its members is only that of members of the organized militia, and no additional authority over them is created by the oath and contract of enlistment. This ingenious instrument, so far as it constitutes the subordination of the actor in it to the state authority, can add nothing to what already has been accomplished by his enrollment in the state forces. So far as his future relation to the National government is concerned, it is merely a contract for future personal service, the breach of which exposes him to the usual consequences of the breach of any contract for personal service. It does not withdraw from him the protection of the thirteenth amendment against involuntary servitude.

The authorities would seem clearly to support the proposition that a citizen may not be subjected to discipline by a military court of the United States until he acquires the status of an enlisted soldier, and that this status cannot be acquired merely by entering into a contract to become a federal soldier at some future date. This was the view of the Judge Advocate General of the army expressed to the Secretary of War and to Congress when the Hay bill was under consideration. It is supported by the decision in *Tyler v. Pomeroy*,<sup>42</sup> and by a dictum in *Home Insurance Co. v. Morse*.<sup>43</sup>

It must be the occasion of no small regret that the immediate result of a nation-wide agitation for adequate military pre-

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42. Allen (Mass.) 480.

43. 20 Wall. 445.

paredness should have resulted in the perpetuation of the demonstrated evils of the militia system in a statute of doubtful constitutionality.

Examples readily might be multiplied of the tendency of national and state legislatures to ignore constitutional limitations. But enough has been stated to demonstrate the urgent need of a reversion to the fundamental principles on which our government is founded and a consideration of the consequences of departures from them. The problems arising in the admitted domain of national legislation are daily increasing in number and complexity so as to tax the ability of the ablest men sent to Washington to make or administer our laws. Only by substantially continuous sessions throughout the year, is Congress enabled to formulate and enact the legislation and make the appropriations required to carry on the government. If to its proper duties and functions shall be added the burden of legislating for the internal police problems of the forty-eight states, besides the territories and dependencies, the entire breakdown of legislative government and the substitution for it of government by the executive, will be inevitable.

To curb and arrest this tendency, the states must perform their proper functions; they too must avoid the temptation to usurp powers not rightly theirs, and must recognize their responsibility for the enactment and enforcement of those measures which enlightened consideration of the duties and responsibilities of modern democracy requires. Thus only will be preserved the government which our fathers devised; a government in which the sovereignty of the people finds expression in channels marked out for the protection of individual liberty, the maintenance of the principle of local self-government, and the restriction of the national power to its exercise in those directions which affect the entire country, and where only the combined sovereignty of the whole people of the United States adequately can protect the interests of the nation.

# THE HAGUE CONVENTION OF 1912, RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES: A COMPARISON WITH ANGLO-AMERICAN LAW

[CONCLUDED]

BY ERNEST G. LORENZEN

## VIII. RECOURSE FOR NON-ACCEPTANCE AND NON-PAYMENT.

The continental law did not allow an immediate right of recourse for non-acceptance. A refusal to accept entitled the holder only to security from the drawer and the indorser that the bill would be paid on the day of maturity.<sup>150</sup> In practice this right amounted to very little. The Uniform Law adopts the Anglo-American rule, which allows immediate recourse.<sup>151</sup> It goes beyond the Anglo-American law<sup>152</sup> in providing that such right shall exist also in case of the bankruptcy of the drawee, whether an acceptor or not, of suspension of payments, of ineffective execution against his goods,<sup>153</sup> and in case of the bankruptcy of the drawer<sup>154</sup> of a bill not subject to acceptance.<sup>155</sup> The Uniform Law, however, does not allow the holder of a bill to treat the bill as dishonored by non-acceptance without presentment for acceptance or

150. Art. 120, French Code de Commerce; Art. 25, German Bills of Exchange Law; *Meyer*, I, pp. 464-471.

151. Art. 42. Where a drawer has stipulated that the instrument must be presented for acceptance within a certain period, a failure to present the same within the time stipulated will cause the holder to lose his right of recourse against the drawer and indorsers for non-payment as well as for non-acceptance, unless it results from the terms of the stipulation that the drawer intended to release himself only from the guaranty of acceptance. (Art. 52, par. 2). If the stipulation for a limit of time for presentment is contained in an indorsement, the indorser alone is able to avail himself of it. (Art. 52, par. 3) "Proceedings," 1912, p. 293; "Actes," 1912, I, p. 96.

152. According to Anglo-American law, where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors before the bill matures, the holder has only the right to have the bill protested for better security against the drawer and indorsers. N. I. L. s. 158; B. E. A. s. 51 (5). This was also the continental rule. *Meyer*, I, pp. 471-480.

153. The holder is entitled to exercise recourse only after presentment of the bill to the drawee for payment and after protest. Art. 43, par. 5.

154. The production of a judgment setting forth the bankruptcy of the drawer is sufficient to enable the holder to exercise recourse. Art. 43, par. 6.

155. Art. 42, par. 2.

protest, as he may in the United States, when the drawee is dead, or has absconded, or is a fictitious person, or a person not having capacity to contract by bill.<sup>156</sup>

Wide differences existed and still exist in the law respecting the conditions precedent to the right of recourse upon non-acceptance and non-payment, and concerning the effect of an act of God and other circumstances rendering compliance with such conditions impossible or unnecessary.

*Presentment for Payment and Protest.* In England and in the United States only foreign bills, appearing to be such upon their face, require protest for non-acceptance or non-payment.<sup>157</sup> On the continent<sup>158</sup> and under the Uniform Law,<sup>159</sup> a protest is required whenever a bill or note is dishonored by non-acceptance or non-payment, except when protest is waived.<sup>160</sup> The laws differ also widely in regard to the time of presentment. According to Anglo-American law such presentment must be made on the day the instrument falls due, except in so far as this is modified by the rules relating to Sundays and holidays.<sup>161</sup> Failure to make presentment on that day is excused, however, if it cannot be made in the exercise of reasonable diligence. Where presentment is not made as required by law, the drawer and indorsers are discharged.<sup>162</sup> In other countries, France for example, when presentment is not made on the day of maturity, but takes place within the time allowed for the drawing of the protest the drawer or indorsers will not be discharged, provided the drawer has not become insolvent in the meanwhile.<sup>163</sup> Another group of countries, including Germany, authorizes presentment within the limits allowed for protesting and imposes upon the holder no penalty for a failure to present the instrument to the drawee on the day of maturity.<sup>164</sup> The

156. N. I. L. s. 148. In England he may do so "where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill." B. E. A. s. 41 (2) (a).

157. N. I. L. ss. 118, 152; B. E. A. s. 51 (2).

158. *Meyer*, I, p. 310.

159. Art. 43 (1). Upon the request of Italy and Belgium, Art. 9 of the Convention was adopted, according to which each contracting state may prescribe that, with the assent of the holder, protests to be drawn within its territory may be replaced by a declaration dated and written upon the bill itself, signed by the drawee, and transcribed in a public register within the time fixed for protests.

160. By a stipulation "return without costs," "without protest," and the like. Art. 45, par. 1.

161. N. I. L. ss. 71, 85; B. E. A. ss. 45 (1), 14 (1).

162. N. I. L. s. 70; B. E. A. s. 45.

163. *Williamson*, pp. 143-144; *Lyon-Caen & Renault*, IV, pp. 298-299.

164. *Meyer*, I, p. 277; *Staub*, p. 108.

Uniform Law follows that of the group last mentioned, and requires that the holder present the instrument for payment either on the day when it is payable or on one of the two succeeding business days.<sup>166</sup> It allows, as it were, two days of grace to the holder while it denies all grace to the payer. Each contracting state is allowed to prescribe that, as regards bills payable within its territory, presentment shall be made on the day of their maturity. Failure to observe this rule shall give rise only to a claim for damages.<sup>168</sup>

The Uniform Law requires protest for non-payment to be made either on the day when the bill or note is payable, or on one of the two succeeding business days.<sup>167</sup> In Anglo-American law, whenever protest is required, it must be made on the day of dishonor.<sup>168</sup> It suffices, however, that the bill be noted on that day. When duly noted, the protest may be subsequently extended as of the date of noting.<sup>169</sup> The system of noting is unknown to the continental countries<sup>170</sup> and to the Uniform Law.

Waiver of protest, according to Anglo-American law, is deemed to be a waiver of presentment and notice of dishonor, as well as of formal protest.<sup>171</sup> Under the continental law<sup>172</sup> and the Uniform Law,<sup>173</sup> it does not release the holders from presentment within the time prescribed, nor from giving notice. In some countries, Germany,<sup>174</sup> for example, and under the Uniform Law,<sup>175</sup> a waiver of protest, however, shifts the burden of proof as to due presentment

165. Art. 37.

166. Art. 7, Convention.

167. Art. 43, par. 2. Protest for non-acceptance must be made within the time fixed for presentment for acceptance. Art. 43, par. 3. Where the drawee asks that a second presentment be made to him on the day following the first, and the first presentment is made on the last day allowed for presentment, the protest may be drawn up on the next day. Art. 43, par. 3.

168. "This rule often gives rise to great inconvenience in country places, where it is difficult to obtain the services of a notary. It would be well to alter the rule if a preliminary difficulty can be got over. The noting or protest is generally taken as showing that the bill was duly presented on the proper day, but if the protest be not initiated until the next day, there is nothing to show that the bill was duly presented the day before. Moreover, notice of dishonor must, as a general rule, be sent off on the day after dishonor. Any change in our law requires careful consideration." "Memorandum on Uniform Law of Bills of Exchange" by Sir M. D. Chalmers and Mr. F. H. Jackson, British delegates, "Proceedings," 1912, at p. 404.

169. N. I. L. s. 155; B. E. A. s. 51 (4).

170. Meyer, I, p. 351.

171. N. I. L. s. 111; Daniel, s. 1095a.

172. Meyer, I, p. 312; Lyon-Caen & Renault, IV, pp. 328-329.

173. Art. 45.

174. Art. 42, German Bills of Exchange Law.

175. Art. 45, par. 2.

upon the person who claims that due presentment was not made. If, notwithstanding a waiver, the holder protested the bill or note he could recover the protest fees in Germany.<sup>176</sup> In France<sup>177</sup> and England,<sup>178</sup> such a stipulation is held to be a prohibition to protest, so that the fees are not recoverable. The same appears to be true in the United States,<sup>179</sup> although there is some dissenting opinion.<sup>180</sup> In some countries a waiver of protest would bind only the person who made it.<sup>181</sup> In others, a distinction is made between the drawer and the indorsers. A stipulation by the drawer in the body of the instrument would bind all indorsers.<sup>182</sup> A stipulation by an indorser would, in some countries, bind such indorser only,<sup>183</sup> in other countries it would bind him and subsequent indorsers.<sup>184</sup> The Uniform Law provides that where the stipulation is inserted by the drawer it is effective as to all signers.<sup>185</sup> Nothing is said about the effect of a stipulation by an indorser; by implication such a stipulation will bind the indorser only. If, in spite of a waiver of protest by the drawer, the holder protests the bill or note, the costs are at his expense. When the stipulation is inserted by an indorser, the costs of protest, when such has been drawn, may be recovered from all the parties.<sup>186</sup>

*Notice.* Radical differences existed in the laws of the various countries relating to the requirement of notice. In the Anglo-American system, notice of dishonor is the important thing after due presentment, and failure to give due notice discharges the drawer and indorsers from liability on the bill or note.<sup>187</sup> Protest is required only in the case of foreign bills, and, according to Mr. Chalmers, "is looked upon rather as an interesting antiquarian form which must be complied with to please our foreign friends."<sup>188</sup> In continental countries protest is the all important thing. A very loose system of notice generally prevailed and failure to give

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176. *Ibid.*

177. *Lyon-Caen & Renault*, IV, p. 328; *Thaller*, p. 741.

178. B. E. A. s. 57 (1) (c).

179. *Johnson v. Bank of Fulton*, 29 Ga. 260; *Legg v. Vinal*, 165 Mass. 555.

180. *Merritt & Myers v. Benton*, 10 Wend. (N. Y.) 117. See also *Daniel*, s. 933.

181. E. g. Germany; *Staub*, Art. 42, s. 3.

182. *Meyer*, I, p. 314; N. I. L. s. 111.

183. N. I. L. s. 111.

184. *Meyer*, I, p. 314; *Lyon-Caen & Renault*, IV, pp. 330-331; *Thaller*, p. 740.

185. Art. 45, par. 3.

186. *Ibid.*

187. N. I. L. s. 89; B. E. D. s. 48.

188. "Proceedings," 1912, p. 418.



notice did not discharge the drawer and indorser from liability on the instrument, but entitled them merely to damages against the holder for any loss suffered on account of the neglect.<sup>189</sup> Great differences existed in the details regarding the time and manner of giving notice.<sup>190</sup> In France the requirement of notice was combined with that of "prescription." In order to exercise his right of recourse against a drawer and indorser, the holder must notify the protest to him, and, in default of payment, summon him to appear before a commercial court within two weeks<sup>191</sup> after the date of protest. The Uniform Law stands substantially upon the footing of the general continental law. It provides in Article 44 as follows:

"The holder must give notice of non-acceptance or non-payment to his indorser and to the drawer within the four business days which follow the day of the protest, or, in case of the stipulation, 'return without costs', within the four business days which follow the presentment."<sup>192</sup>

"Each indorser must within two days give notice to his indorser of the notice which he has received, indicating the names and addresses of those who have given the preceding notices, and thus in succession back to the drawer. The limit of time above indicated shall run from the receipt of the preceding notice.

"In a case where an indorser has not indicated his address or has signed in an illegible manner, it shall suffice if notice is given to the preceding indorser.

"A party who has to give notice may do so in any form, even by the simple return of the bill of exchange. He must prove that he has done this within the time prescribed.

"This time limit shall be deemed to have been observed if

189. *Meyer*, I, pp. 368-369; Art. 45, German Bills of Exchange Law. The claim for damages is regarded as subject to the rules of the civil law, instead of those relating to bills of exchange. Excuses for delay on account of accident or vis major will be allowed even though they are not recognized in the exchange law of the country in question. *Meyer*, I, p. 368.

190. *Meyer*, I, pp. 367-377.

191. Art. 165-167, Code de Commerce, amended by law of December 22, 1906; *Lyon-Caen & Renault*, IV, pp. 320-324; *Thaller*, pp. 742-744; *Williamson*, pp. 156-161.

Two weeks is the minimum. Where the bill is drawn in France and is payable beyond the continent of Europe, the time may vary from one month to eight months. This period will be doubled in times of maritime war. If the holder sue the indorser and drawer collectively, he enjoys with reference to each of them the period stated. Each indorser may exercise recourse within the same period, the time beginning to run from the day following the date of summons. Arts. 165-167.

192. Four days are allowed to meet the necessities of some banks in countries like France, where a large number of bills mature at the end of a month or quarter of the year. See "Proceedings," 1912, p. 290; "Actes," 1912, I, p. 93.

an ordinary letter giving the notice has been mailed within the said time.

"The party who does not give notice within the time above indicated shall not lose his right of recourse; he shall be responsible for the injury, if any has occurred, caused by his negligence, but the damages shall not exceed the amount of the bill of exchange."

*Act of God, etc.* The question whether the duties necessary to be performed as conditions precedent to the right of recourse are absolute duties, or duties of reasonable diligence has been answered in different ways. In Anglo-American law only reasonable diligence is required, so that any delay is excused when caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence<sup>193</sup>, and the act in question is dispensed with if, after the exercise of reasonable diligence, it can not be made.<sup>194</sup> At the opposite pole stood the law of Germany, which regarded them as absolute duties and accepted no excuses.<sup>195</sup> The French law followed the Anglo-American view, but recognized as excuses insuperable obstacles of a general character only, not personal excuses, such as arrest, sudden illness, or death.<sup>196</sup> The subject gave rise to vigorous discussion at the conferences of the Hague.<sup>197</sup> The Uniform Law adopts a middle course and provides that when presentment or protest is prevented by an insuperable obstacle (*vis major*) the time for performance is extended. After the cessation of the *vis major* the holder must present the bill or note and, if necessary, protest the same without delay. If the *vis major* continues for more than thirty days from maturity recourse may be exercised without presentment or protest.<sup>198</sup> The holder is bound to give notice without delay of the case of *vis major* to his indorser and to set forth this notice, dated and signed by him, on the bill of exchange, or on an allonge.<sup>199</sup> The requirement that the *vis major* must have continued for thirty days before allowing

193. N. I. L. ss. 81, 113, 147, 159; B. E. A. ss. 46 (1), 50 (1), 39 (4), 51 (9).

194. N. I. L. ss. 82 (1), 112, 148 (2), 159; B. E. A. ss. 46 (2) (a), 50 (2) (a), 41 (2) (b), 51 (9).

195. *Staub*, Art. 41, s. 3.

196. *Lyon-Caen & Renault*, IV, pp. 312-313; *Thaller*, pp. 741-742.

197. "Proceedings," 1910, pp. 212-219, 256-257; *Actes*, 1910, pp. 92-94, 339-345; "Proceedings," 1912, p. 293; "Actes," 1912, I, pp. 96-98.

198. For bills of exchange at sight or a certain time after sight the period of thirty days runs from the date on which the holder has, even before the expiration of the time for presentment, given notice of the *vis major* to his indorser. Art. 53, par. 5.

199. Art. 53. In other respects the rule governing notice applies. Art. 53, par. 2.

recourse seemed a fair compromise upon a consideration of the interests of the holder and of those of the parties liable upon the instrument. It was hoped, moreover, that in most cases, an amicable settlement might be reached during this time. What constitutes *vis major* is a question of fact. The Uniform Law provides, however, expressly that matters purely personal to the holder or to the person intrusted with presentment of the bill, or with the drawing of a protest, shall not be deemed to constitute cases of *vis major*.<sup>200</sup> Such matters as railway accidents, delays in the mail, or interruptions of traffic, which affect a number of people, may, therefore, be regarded as cases of *vis major*. Different holdings upon this subject must be expected.<sup>201</sup>

*Other Excuses Dispensing with Presentment, Notice or Protest.* Anglo-American Law excuses the holder from fulfilling the ordinary conditions required to fix the liability of the drawer and indorsers in other cases than those where the acts cannot be done in the exercise of reasonable diligence. The only excuse expressly recognized by the Uniform Law is that of an insuperable obstacle. Under the Uniform Law it would seem, therefore, that presentment and protest for non-acceptance will be necessary where the drawee is dead or has no capacity to contract by bill,<sup>202</sup> and that presentment and protest for non-payment will be required, in order to charge the drawer, where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument,<sup>203</sup> and, in order to charge the indorser, where the instrument was made or accepted for his accommodation and he had no reason to expect that it would be paid if presented.<sup>204</sup> Even where presentment is impossible, as where the drawee is a fictitious person, a formal protest may have to be made.<sup>205</sup>

*Remedies where Recourse is Lost.* Where the holder has failed to comply with the conditions prescribed by law in order to charge the drawer or the indorser, and has thus lost his right of recourse, he may not be deprived of all rights under the general law of a particular country. Countries belonging to the French group, for

200. Art. 53, par. 6. Inasmuch as the holder has under the Uniform Law two days of grace, so to speak, within which to present the instrument after maturity, these provisions will not operate as harshly as they would do if presentment on the day of maturity were required.

201. The recognition of foreign judgments as to what constitutes *vis major* will be subject to the ordinary rules of private international law relating to the recognition of foreign judgments.

202. Contra: N. I. L. s. 148; B. E. A. s. 41 (1).

203. Contra: N. I. L. s. 79; B. E. A. see s. 46 (2) (c).

204. Contra: N. I. L. s. 80; B. E. A. s. 46 (2) (d).

205. Contra: N. I. L. s. 82 (2); B. E. A. s. 46 (2) (b).

example, allow him to sue the drawer who has not provided cover.<sup>206</sup> In countries belonging to the German group, he has a quasi-contractual remedy against the drawer or indorser who would otherwise be unjustly enriched. He will have a right of action on the consideration, save in so far as the drawer or indorser may have suffered loss as a result of the holder's failure to present the instrument or to protest it in time.<sup>207</sup> The Uniform Law lays down no rule in this matter, but allows the contracting states to follow either the French or German practice.<sup>208</sup> Anglo-American law, it would seem, denies generally recovery even of the original consideration.<sup>209</sup>

#### IX. RIGHTS AND LIABILITIES OF PARTIES.

*Drawing Without Recourse.* In Anglo-American law a drawer may draw without recourse;<sup>210</sup> under the Uniform Law such a stipulation is deemed not written.<sup>211</sup>

*Forged Indorsement.* The position of the Uniform Law with regard to forged indorsements may be gathered from the following articles:

"The possessor of a bill of exchange shall be deemed to be its lawful holder, provided that he proves his title by an uninterrupted series of indorsements, even though the last indorsement is in blank. When an indorsement in blank is followed by another indorsement, the signer of the latter shall be presumed to have acquired the bill under an indorsement in blank. Indorsements which have been cancelled shall be deemed null.

"If a party has been dispossessed of a bill of exchange in any manner whatever, the holder proving his title in the manner indicated in the preceding paragraph shall not be bound to surrender the bill, unless he has acquired it in bad faith or in acquiring it has been guilty of gross negligence."<sup>211a</sup>

206. *Thaller*, p. 683.

207. Art. 83, German Bills of Exchange Law; *Meyer*, I, pp. 161-163.

208. Art. 13, Convention.

209. *Woodward*, "Quasi-Contracts," Sec. 92; *Continental National Bank v. Metropolitan Natl. Bank*, 107 Ill. App. 455; *Allan v. Eldred*, 50 Wis. 132.

210. N. I. L. s. 61; B. E. A. s. 16 (1).

211. Art. 9. In the "Memorandum on Uniform Law on Bills of Exchange," submitted by the British delegates, *Sir M. D. Chalmers* and *Mr. F. H. Jackson*, reprinted in "Proceedings," 1912, pp. 396 et seq., the following comment appears on p. 399: "Such bills are very uncommon, though, as we pointed out, they might be justifiable where a man was drawing for the account of a third party, or where the drawer was acting in a representative capacity, e. g., as an executor. The continental delegates adhered to their rule on the ground, that where a drawer drew a bill without recourse there was nobody liable on the bill at all at the time of its issue, and if it were refused acceptance there might never be any body liable on it."

211a. Art. 15.

"The drawee who pays before maturity does so at his own risk and peril.

"Any one who pays at maturity shall be validly discharged, unless he has been guilty of fraud or gross negligence. He is bound to verify the regularity of the series of indorsements, but not the signatures of the indorsers."<sup>212</sup>

In Anglo-American law title to the bill or note payable to order can be acquired only through a correct chain of genuine indorsements. A forged indorsement will prevent the passing of title.<sup>213</sup> According to the continental view the negotiability of the instrument confers title upon every holder who has taken it when the chain of indorsements is only formally correct. The mere fact that one or more of the indorsements are forgeries is immaterial.<sup>214</sup> In some of the countries the holder will acquire an indefeasible title only when he is not guilty of fraud or gross negligence in the taking of the instrument.<sup>215</sup> This view has become that of the Uniform Law.<sup>216</sup> Where a holder has acquired title to a bill of exchange in a continental country under a forged indorsement, such title and that of every subsequent holder will be recognized in England under its rules relating to the Conflict of Laws.<sup>217</sup>

It is equally well settled in English and American law that when an instrument is payable to order, a drawee, in order to be discharged, must pay to the person who holds the legal title or to his agent. He must examine the genuineness of the indorsements at his peril.<sup>218</sup> No exception to this rule exists in this country. In England,<sup>219</sup> the law relieves the banker upon whom checks or other demand drafts payable to order are drawn from the responsibility

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212. Art. 39.

213. N. I. L. s. 23; B. E. A. s. 24.

214. *Meyer*, I, pp. 268-274. The harshness of the rule as regards the holder is mitigated somewhat in certain countries by a special procedure (amortization) which may be instituted when a bill or note is lost, for the purpose of declaring it null and void. See *Meyer* I, pp. 569 et seq.; *Staub* Art. 73; Secs. 824-850, German Code Civil Procedure. This procedure is of no avail, of course, where the loss is not discovered before the bill is paid. The rights of the holder in case of loss are not dealt with in the Uniform Law, the matter being left to the law of the contracting states. See Article 15, Convention.

215. The term "good faith" in the law of bills and notes has generally the same signification as it has in Anglo-American law. To charge a person with bad faith there must exist actual knowledge of the infirmity or defect or knowledge of such facts as to put him on notice. See N. I. L. s. 56 and B. E. A. s. 90. In Germany the term is equivalent to "a conviction, not resting upon gross negligence that through its acquisition no rights of third parties were affected detrimentally." *Meyer*, I, p. 44.

216. Art. 15, par. 2.

217. *Embiricos v. Anglo-Austrian Bank*, (C. A.) 1905, 1 K. B. D. 677.

218. N. I. L. ss. 119 (1), 88, 191 ("holder"); B. E. A. s. 59 (1).

219. B. E. A. s. 60.

of verifying the indorsements where he pays the instrument in good faith and in the ordinary course of business. On the continent the payer need not inquire into the genuineness of the indorsement, and, in some countries at least, he would make such examination at his peril.<sup>220</sup> With regard to inquiring into the identity of the party demanding payment the duty of the payer is limited to the exercise of due care.<sup>221</sup> The French law makes a distinction. Payment before the maturity of the instrument is made at the peril of the person so paying, imposing upon him the duty of examining the genuineness of the indorsements and the identity of the party presenting the instrument. Payment on the day of maturity exonerates him from these duties in the absence of fraud or gross negligence.<sup>222</sup> This distinction is attempted to be justified on the ground that the payer, who must pay the instrument promptly on the day of maturity, cannot take the time to inquire into the genuineness of the indorsements or into the identity of the holder. The Uniform Law<sup>223</sup> adopts the distinction of the French law concerning the payer's duty to examine the validity of the indorsements, but leaves his obligation as regards the identity and capacity of the holder to the courts.<sup>224</sup>

At the conference, the British delegates opposed the adoption of the continental rule relating to forged indorsements, on the ground that it would encourage laxity in transactions involving bills and notes. The question, after all, is who of two innocent parties shall suffer, for neither the payer nor the holder is in a position to make certain of the genuineness of the indorsements. On the whole, it would seem fairer that the risk concerning the genuineness of the indorsements be thrown upon the holder who has taken the bill or note from a stranger. The distinction drawn in England between bankers and other drawees, seems arbitrary.

*Warranties and Admissions.* The Uniform Law contains no provisions similar to those found in the Negotiable Instruments Law<sup>225</sup> relating to the admissions of the acceptor and to the warranties of a person negotiating a bill or note by means of a qualified or unqualified indorsement. The liability of the qualified indorser is regarded a matter of civil law and hence is not dealt with in the

220. Meyer, I, p. 269; Staub, Art. 36, s. 23.

221. Meyer, I, p. 269.

222. Lyon-Caen & Renault, IV, pp. 252-259; Thaller, p. 726; Williamson, pp. 121-125.

223. Art. 39.

224. "Proceedings," 1910, p. 252; "Actes," 1910, p. 89.

225. Secs. 62, 65, 66.

Uniform Law. The object of the Negotiable Instruments Law<sup>226</sup> is attained in a measure by the simple provision that the forgery of a signature, even that of the drawer or acceptor, shall not in any way affect the validity of the other signatures.<sup>227</sup>

*Defenses.* In the advance draft of 1910 an attempt was made to enumerate the defenses which could be set up against the holder. At the second conference, this enumeration was deemed incomplete, and it was felt that it was practically impossible to make out a complete list. It was decided, therefore, to indicate merely the defenses which can not be set up against the holder, and to leave the question in other respects to the courts. According to Article 16 of the Uniform Law parties sued on a bill can not set up against the holder defenses based upon their personal relations with the drawer or with prior holders, unless the transfer has taken place in pursuance of a fraudulent understanding. The question of alterations, however, is dealt with specifically in the Uniform Law. There is but one article devoted to the subject, which reads as follows:

"In case of alteration of the text of a bill of exchange, parties who have signed subsequent to the alteration are bound according to the terms of the altered text; parties who have signed prior to the alteration are bound according to the terms of the original text."<sup>228</sup>

This article is couched in such general language as to leave doubt as to its meaning in important particulars. The Negotiable Instruments Law<sup>229</sup> and the Bills of Exchange Act<sup>230</sup> are more specific.<sup>231</sup>

*Amount of Recovery.* In regard to the amount of recovery, the Uniform Law has the following provisions:<sup>232</sup>

Art. 47—"The holder may claim from the party against whom he exercises recourse:

"1. The amount of the bill of exchange not accepted or not paid, with the interest, if any has been stipulated for.

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226. Secs. 62, 65.

227. Art. 68.

228. Art. 69.

229. N. I. L. s. 124.

230. B. E. A. s. 64.

231. Sec. 124, N. I. L., reads: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against the party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof, according to the original tenor."

232. The rules apply also to promissory notes. See Art. 79.

"2. Interest at the rate of five per cent. from the date of maturity.

"3. The costs of the protest, those of the notices given by the holder to the preceding indorser and to the drawer, as well as other expenses.

"4. A commission, which, in the absence of agreement, shall be one-sixth of one per cent. of the principal of the bill of exchange, and shall not in any case exceed this rate.

"If recourse is exercised before maturity, the amount of the bill shall be subject to a deduction for discount. This discount shall be calculated, at the option of the holder, either according to the official rate of discount (bank rate), or according to the rate in the open market on the date of the recourse in the place where the holder is domiciled."

Art. 48—"A party who has taken up and paid a bill of exchange may claim from the parties liable:

"1. The entire sum which he has paid.

"2. Interest on said sum, calculated at the rate of five per cent., beginning with the day of payment.

"3. The expenses which he has incurred.

"4. A commission on the principal of the bill of exchange, fixed in conformity with Article 47, subhead 4."

The Uniform Law provides further:

Art. 51—"Any party having the right to exercise recourse may, in the absence of contrary stipulation, recover the amount by means of a new bill of exchange (redraft), undomiciled and drawn at sight upon one of the parties liable to him.

"The redraft shall include, in addition to the amounts indicated in Articles 47 and 48, the brokerage paid and the stamp tax upon the redraft.

"If the redraft is drawn by the holder, the amount shall be fixed according to the rate ruling for a bill of exchange at sight, drawn in the place where the original bill was payable upon the place of residence of the party liable. If the redraft is drawn by an indorser, the amount shall be fixed according to the rate ruling for a bill of exchange at sight drawn in the place where the drawer of the redraft resides upon the place of residence of the party liable."

The Bills of Exchange Act<sup>233</sup> awards the same damages to the holder, to the drawer, and to the indorser and allows them to recover:

(1) The amount of the bill.

(2) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case.

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233. B. E. A. s. 57 (1). The rules under sect. 57 (1) apply also to notes. B. E. A. s. 89.



(3) The expenses of noting, or, when protest is necessary,<sup>234</sup> and the protest has been extended, the expenses of protest.

The above rules do not cover the entire field. A foreign drawer, for example, who has paid re-exchange may recover it from an English acceptor.<sup>235</sup>

The rate of interest allowed in England appears to be usually five per cent.<sup>236</sup> No commission is allowed.<sup>237</sup> Where suit is brought before maturity, the full amount may be recovered, contrary to the Uniform Law, without deduction for a discount.

With regard to the question of a "redraft" the Bills of Exchange Act lays down the rule:

"In the case of a bill which has been dishonored abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."<sup>238</sup>

Mr. Chalmers makes the following comment upon this subdivision:

"The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the *then rate of exchange* on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor. The expenses consequent on dishonor are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the cost of the stamp.

"The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a 're-draft.' The indorser who pays a re-draft may in like manner draw upon the antecedent party."<sup>239</sup>

In the United States there is great lack of uniformity with respect to the subject of damages. The Negotiable Instruments Law does not undertake to regulate the matter. In lieu of re-

234. For the law of the United States, see, ante, text and notes 178-179.

235. Chalmers, p. 195; *Ex parte Roberts, in re Gillespie* (1886) 16 Q. B. D. 702; 18 Q. B. D. 286, C. A.

236. Chalmers, p. 195.

237. A commission is allowed under the continental and the Uniform Law by way of compensation for the damage which the holder may have suffered as a consequence of the non-fulfilment of the obligations assumed towards him; "Proceedings," 1910 p. 172; "Actes," 1910, p. 299.

238. Sec. 57, Subd. 2.

239. Chalmers, p. 196.

exchange the statutes frequently establish fixed amounts of damages.<sup>240</sup>

*Partial Payments.* The question whether partial payment should be allowed was debated a good deal at the Hague conferences. In England and in the United States, the holder has the option whether he will accept partial payment or not.<sup>241</sup> The Uniform Law obliges him to accept such payment in the interest of the drawer and indorsers, who are discharged to that extent.<sup>242</sup> Upon the express demand of the French Government the convention<sup>243</sup> permits each contracting state to authorize the holder to refuse partial payment of instruments payable within its own territory.

*Payment into Court.* In default of presentment of a bill or note within the time specified by law, the Uniform Law<sup>244</sup> authorizes the debtor to pay the amount due into court, a right which he does not enjoy under Anglo-American law.

*Statute of Limitations.* Contrary to the Negotiable Instruments Law and to the Bills of Exchange Act, the Uniform Law lays down rules concerning the running of the statute of limitations. Against the acceptor all actions arising out of a bill of exchange are barred after three years calculated from the date of maturity. Actions by the holder against the indorsers and against the drawer are barred after one year from the date of the protest drawn up within the legal time or from the date of maturity where there is a stipulation "return without costs". Actions of recourse by indorsers against each other, and against the drawer, are barred after six months, counting from the day when the indorser took up the bill, or from the day that he himself was sued.<sup>245</sup>

Much time was spent at the conference in the discussion of what facts should be regarded as sufficient to interrupt the running of the statute of limitations, but no agreement was reached, and the matter was left to the legislation of the contracting states.<sup>246</sup>

240. See *Daniel*, ss. 1438-1460.

241. *Wood's Byles*, \*234.

242. Art. 38, par. 2. The drawee may require that such payment shall be specified on the bill and that a receipt therefor be given to him. Art. 38, par. 3.

243. Art. 8.

244. Art. 41.

245. Art. 70. Each contracting state is at liberty to decide whether, where the statute of limitations has run, an action shall not lie against the drawer who has not provided cover, or against a drawer or indorser who is unjustly enriched. The same right exists when the acceptor has received cover or has been unjustly enriched. Art. 13, Convention.

246. Convention, Art. 15.

# X. ACCEPTANCE AND PAYMENT FOR HONOR. REFEREE IN CASE OF NEED.

The Uniform Law deals with the referee in case of need and with the subject of acceptance and payment for honor under the title of "Intervention for Honor". It lays down a few general rules and then deals separately with "acceptance for honor" and "payment for honor". The general provisions differ from Anglo-American law in allowing "a third party, even the drawee, or a party already liable on the bill, except only the acceptor," to intervene.<sup>247</sup> The Negotiable Instruments Law and the Bills of Exchange Act restrict acceptance for honor to "any person not being a party already liable thereon,"<sup>248</sup> though they permit *any* person to pay for honor.<sup>249</sup> The Uniform Law prescribes for both forms of intervention that the party intervening is bound to give notice without delay of his intervention to the party for whom he has intervened.<sup>250</sup> Failure to do so may result in liability for damages. There is no such requirement in Anglo-American law.

*Acceptance for Honor.* The Uniform Law differs from the Negotiable Instruments Law but agrees with the Bills of Exchange Act in not providing for a further acceptance by a different party,<sup>251</sup> and in requiring acceptance for honor to be written on the bill.<sup>252</sup> The Negotiable Instruments Law and the Bills of Exchange Act prescribe that where a bill has been accepted for honor or contains a referee in case of need it must be protested for non-payment before it is presented for payment to the acceptor for honor or to the referee in case of need.<sup>253</sup> The Uniform Law contains no such requirement concerning the referee in case of need. Regarding the acceptor for honor, it adopts the rule that he shall be held in the same manner as the person for whose honor he intervenes.<sup>254</sup> Presentment for payment and protest would be necessary, therefore, if he intervened on behalf of the drawer or an indorser.

According to the Negotiable Instruments Law and the Bills of Exchange Act presentment to the acceptor for honor must be made at maturity, and, when he refuses to pay, the instrument must be

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247. Art. 54, par. 3.

248. N. I. L. s. 161; B. E. A. s. 65 (1).

249. N. I. L. s. 171; B. E. A. s. 68 (1).

250. Art. 54, par. 4.

251. N. I. L. s. 161; cf. B. E. A. s. 65 (1).

252. Uniform Law, Art. 56; B. E. A. s. 65 (3). The N. I. L. s. 162 is satisfied if the acceptance for honor is in writing.

253. N. I. L. s. 167; B. E. A. s. 67 (1).

254. Art. 57, par. 1.

protested.<sup>255</sup> Under the Uniform Law the holder must present the bill to the acceptor for honor "at the place of payment", and, in case of non-payment, protest the same.<sup>256</sup> Such presentment is not necessary if the acceptor for honor does not have an office at the place fixed for payment according to the terms of the bill of exchange itself.<sup>257</sup> Presentment for payment to the referee in case of need is required under the same conditions;<sup>258</sup> whereas under Anglo-American law no presentment to such referee need be made.<sup>259</sup> In default of protest within the time specified by law, the parties who have indicated the case of need or for whose account the bill has been accepted and the subsequent indorsers are discharged from liability.<sup>260</sup> The Uniform Law allows the party for whose honor an acceptance is given and the parties liable to him to take up the instrument at once under discount and to proceed against the parties liable to them.<sup>261</sup> No such right exists under Anglo-American law.

*Payment for Honor.* Anglo-American law allows a bill which has been protested for non-payment to be paid for honor without fixing a time within which such intervention may take place.<sup>262</sup> Under the Uniform Law payment for honor cannot be made later than the day following the last day allowed for the drawing of the protest for non-payment.<sup>263</sup> It provides also that it must be for the entire sum which the party in whose behalf it is made would have to pay, excepting the commission, and that it must be established by a receipt given on the bill, showing for whose honor payment was made.<sup>264</sup> In default of such indication, the payment shall be deemed to have been made for the drawer.<sup>265</sup> According to the

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255. N. I. L. s. 170; B. E. A. s. 67 (4).

256. Art. 59, par. 1.

257. "Proceedings," 1912, p. 296; Actes, 1912, I, p. 99.

258. Art. 59, par. 1.

259. N. I. L. s. 131; B. E. A. s. 15.

260. Art. 59, par. 2.

261. Art. 57, par. 2.

262. N. I. L. s. 171; B. E. A. s. 68 (1).

263. Art. 58. In the "Memorandum on the Uniform Law submitted by the British Delegates," "Proceedings," 1912, at page 406, it is stated: "The foreign delegates said that the rule was required because the holder ought at once to send off the protest to the indorser he sought to hold liable. But take the case of a bill drawn in South America and dishonored in England. There may be no mail for a fortnight. Why should not the bill be paid for honor at any time within this fortnight? According to English law, any number of duplicate protests may be drawn up from the original noting, so that the foreign reason for the rule has no application here."

264. Arts. 60, par. 1; 61, par. 1.

265. Art. 61, par. 1. *Wood's Byles*, \*267.

Negotiable Instruments Law and the Bills of Exchange Act, payment for honor must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.<sup>266</sup>

The Uniform Law contains a specific provision that the party paying for honor cannot indorse the bill of exchange anew.<sup>267</sup> Both systems of law give the preference in case of competition of payment for honor to the one whose payment will discharge most parties to the bill.<sup>268</sup> The Uniform Law adds that, if this rule is not observed, the party intervening who has knowledge of it shall lose his right of recourse against those who would have been released.<sup>269</sup> The Anglo-American law, as well as the Uniform Law, oblige the holder to accept payment for honor, and, in case of his refusal to do so, he forfeits his right of recourse against the parties who would have been discharged by such payment.<sup>270</sup>

#### XI. BILLS IN A SET.

The law governing bills in a set is very similar in the different countries. One or two differences, however, should be noted. According to the Uniform Law any holder of a bill which does not indicate that it has been drawn in a single specimen, may require at his own expense the delivery of two or more specimens.<sup>271</sup> This duty was imposed upon the drawer for the benefit of an importer beyond the seas who is dependent upon the bills for his means of remittance.<sup>272</sup> In Anglo-American law this seems to be a matter of private arrangement.<sup>273</sup> Another difference is expressed in Article 65 of the Uniform Law, which provides as follows:

"A party who has sent one specimen of a set for acceptance must indicate on the other specimens the name of the party with whom said specimen may be found. The latter is bound to surrender it to the lawful holder of another specimen.

"If he refuses to do so, the holder can not exercise recourse until after he has established by a protest:

"1. That the specimen sent for acceptance has not been delivered to him on his demand.

"2. That acceptance or payment can not be obtained on another specimen."

No such regulations exist in Anglo-American law. The question who shall be deemed the owner of the bill, when two or more

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266. N. I. L. s. 172; B. E. A. s. 68 (3).

267. Art. 62, par. 1.

268. Uniform Law, Art. 62, par. 3; N. I. L. s. 174; B. E. A. s. 68 (2).

269. Art. 62, par. 3.

270. Uniform Law, Art. 60, par. 1; N. I. L. s. 176; B. E. A. s. 68 (7).

271. Art. 63, par. 3.

272. Conant's report, "Proceedings," 1910, p. 20.

273. See Chalmers, p. 238.

parts of a set have been negotiated to different persons in due course, as between such holders, is not answered in the Uniform Law. The Negotiable Instruments Law and the Bills of Exchange Act make the person whose title first accrued the true owner of the bill.<sup>274</sup>

## XII. COPIES.

There are no general provisions in Anglo-American law relating to the subject of copies. The Uniform Law has the following:

Art. 66—"Every holder of a bill of exchange shall have the right to make copies of it.

"A copy must reproduce the original exactly, including indorsements and all other declarations which appear thereon. It must indicate how far it extends as a copy.

"It may be indorsed and guaranteed by aval in the same manner and with the same effects as the original."

Art. 67—"The copy must specify the party in possession of the original instrument. Such party is bound to surrender the aforesaid instrument to the lawful holder of the copy.

"If he refuses to do so, the holder can not exercise recourse against the parties who have indorsed the copy until after he has established by a protest that the original has not been surrendered to him on his demand."

## XIII. CONFLICT OF LAWS.

The Uniform Law devotes three articles to the Conflict of Laws. Such rules were necessary because the entire subject of capacity and matters relating to form and to the mode of performance, to a considerable extent remain subject to the law of the contracting states.<sup>275</sup> The provisions are as follows:<sup>276</sup>

Art. 74—"The capacity of a person to bind himself by a bill of exchange shall be determined by his national law. If such national law declares the law of another state to be applicable, such latter law shall be applied.

"A person who lacks capacity under the law indicated in the preceding paragraph shall nevertheless be validly bound, if he has entered into the obligation within the territory of a

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274. N. I. L. s. 179; B. E. A. s. 71 (3).

275. The sole object of the provision was to lay down rules for those cases with respect to which no complete uniformity had been secured. There is no obligation to apply these rules to non-contracting states. As to them the ordinary national rules governing the Conflict of Laws will, therefore, in all probability continue to govern.

The English rules governing the Conflict of Laws are found in section 72 of B. E. A. The N. I. L. failed to codify the American law on the subject.

276. These rules also apply to promissory notes. Art. 79.

state according to the law of which he would have been competent." <sup>277</sup>

Art. 75—"The form of any contract arising from a bill of exchange shall be regulated by the laws of the state within whose territory such contract has been signed."

Art. 76—"The form and the limits of time of the protest, as well as the form of other proceedings necessary for the exercise or preservation of rights arising from a bill of exchange, shall be regulated by the laws of the state within whose territory the protest must be drawn up or the act in question must be done."

According to Article 20 of the Convention, the right is reserved to the contracting states not to apply the above principles: (1), when an engagement is entered into within the territory of a non-contracting state; (2), when the law applicable by virtue of the foregoing principles is the law of a non-contracting state.

A comparison between the rules of the Conflict of Laws applicable by reason of the Convention of the Hague with those of Anglo-American law, is beyond the scope of the present article.

#### XIV. STAMP DUTIES.

In certain countries, <sup>278</sup> including England, <sup>279</sup> a bill or note may be void for want of compliance with the stamp laws. This seemed unjust to the delegates at the Hague conferences. <sup>280</sup> The convention, therefore, specifically prohibits the contracting states from subordinating the validity of engagements taken in matters of bills and notes to a compliance with the stamp laws. It authorizes them however, to suspend the exercise of such rights until the prescribed stamp duties have been paid. <sup>281</sup>

The above prohibition does not apply, of course, to non-contracting states.

#### XV. PROMISSORY NOTES.

The rules governing bills of exchange apply under the Uniform Law equally to promissory notes, in so far as they are not inconsistent with the nature of such instruments. <sup>282</sup>

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<sup>277.</sup> Article 18 of the Convention gives to each contracting state the power to refuse to recognize the validity of an engagement entered into in regard to a bill of exchange by any one within its jurisdiction which would not be held valid within the territory of the other contracting states except by application of Article 74, par. 2, of the law.

<sup>278.</sup> *Meyer*, I, pp. 144-148.

<sup>279.</sup> See Stamp Act, 1891, 55 & 56 Vict. c. 39.

<sup>280.</sup> "Proceedings," 1910, p. 296; "Actes" 1910, p. 133.

<sup>281.</sup> Art. 19, Convention.

<sup>282.</sup> Art. 79. Upon the request of Russia each contracting state is authorized not to introduce the Uniform Law in so far as it relates to promissory notes. Article 22, Convention.

The limits set to this article have made it inexpedient in the preceding comparative study to enter upon a consideration of the respective advantages and disadvantages of the individual rules adopted by the Uniform Law, the Bills Exchange Act or the Negotiable Instruments Law. Such a critical examination of the Uniform Law was made by the British government, by the Committee on Bills of Exchange of the English Institute of Bankers, and by the British delegates at the Hague Conferences, Mr. F. Huth Jackson and Sir M. D. Chalmers. The conclusion reached by them was that only in very few instances, the balance of convenience was clearly in favor of the provisions of the Uniform Law. The British delegates in their report to their government felt warranted in recommending only the following amendments to the Bills of Exchange Act:

"1. That days of grace should be abolished.

"2. That in all cases where a bill falls due on a non-business day it should be payable on the succeeding business day.

"3. That where the sum payable by a bill is expressed more than once in words, or more than once in figures, and there is a discrepancy, the lesser sum shall be the sum payable.

"4. That where a bill is expressed to be payable with interest and no rate of interest is specified, interest at the rate of 5 per cent. shall be payable.

"5. That where an acceptance consists of a simple signature of the drawee, it must be on the face of the bill.

"6. That where a bill is dishonored by non-acceptance, a party who is liable on the bill may nevertheless accept it for honor."<sup>283</sup>

The suggestion was made also that it might perhaps be advisable, after a careful consideration of the questions in all their bearings, to bring the English law into closer harmony with the rules of the Uniform Law with regard to three other points.<sup>284</sup>

1. Should not the English principle which exempts a banker from the responsibility of verifying the indorsements on a demand draft drawn upon him be extended to all drawees of bills of exchange and makers of promissory notes, or at any rate, to all demand drafts whether drawn on a banker or not? 2. Should not a bill be allowed to be noted for non-payment both on the day of dishonor and on the next succeeding business day? 3. Should not the English law allow immediate recourse against the drawer and indorsers in case of the failure of the acceptor before maturity?

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283. See "Proceedings," 1912, pp. 409-410.

284. See *ibid.*, p. 410.



Of the six recommendations made, the first and second are already law in the United States. Of the rest, only the fourth and the fifth are of any real importance. Recommendation 3 would clearly be a useful addition to the Negotiable Instruments Law. Recommendation 6 likewise deserves approval. There would appear to be no sufficient reason for a distinction between acceptance and payment for honor which should preclude a person already liable on the instrument from accepting it for honor.<sup>285</sup> As regards the fifth recommendation, the rule of the Bills of Exchange Act, which requires an acceptance to be on the bill, is clearly preferable to the provisions of the Negotiable Instruments Law. Where the mere name of the drawee is written, acceptance should be on the face of the bill, as prescribed by the Uniform Law, in order to avoid confusion with indorsements. The fourth recommendation has the great advantage of fixing a definite rate of interest in lieu of a rate varying with the law of the place of payment.<sup>286</sup>

With respect to the other points mentioned, it is clear that the right to protest the bill for better security, in the case of the failure of the acceptor before maturity, is of little practical value, and that the granting of an immediate right of recourse is a far more effective remedy. The expediency of allowing the noting of a bill of exchange on the day following the day of dishonor, has been discussed *ante*. As regards the duty of the drawee to verify the indorsements, American law differs from that of England and imposes such duty in all cases. In view of the fact that the Negotiable Instruments Law declined to admit any exception to this rule, contrary to the example of the English law, the provision of the Uniform Law, which overthrows the American doctrine in its entirety, would be, of course, unacceptable in this country.

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285. See "Memorandum on Uniform Law by British Delegates," "Proceedings," 1912, p. 406.

286. Under the rules governing the Conflict of Laws, the law of the place of payment would control the rate of legal interest. *Daniel*, ss. 895-901.

# PROCEDURE REFORM

By JOHN LEWSON<sup>1</sup>

The discussion of ways and means to remedy our practice has about passed through all stages, except the final one, as is usual and customary with a problem so broad and far-reaching as is the evolution of a modern system of procedure. To some, it appears that no change in our remedial laws is necessary, and these look with abhorrence upon everything that involves doubt or uncertainty. To others, change means progress, and any modification of the present regime even to the extent of its complete elimination is acceptable and would be hailed with commendation. Our problem is to find common ground between these extremes.

That reforms in practice are needed cannot be seriously questioned. We find a well-developed movement in this state for reform in practice reaching as far back as the early seventies. If for no other reason, than to determine the existence of a necessity for improvement in procedure, it would be quite reasonable to assume that there are now, and, no doubt, there always will be, many imperfections in our practice, some of which, of quite a grievous nature, requiring a just and speedy remedy.

Modern business demands accurate and quick results. Great enterprises are launched, tested, and made permanent or abandoned in a remarkably short period of time. What formerly took a lifetime to accomplish is now being done in a very small number of years. It is only by the highest standard of efficiency that present-day achievements are made possible. The elimination of all manner of waste in obtaining results is the guiding-star of the twentieth century.

But this is not true of the legal profession. By reason of the great mass of reported cases and delays in securing court action, lawyers today find it difficult to properly advise clients. Our courts, from Circuit to Supreme, are considerably and unnecessarily overworked. "Speedy justice," the boast of old England is impossible under present conditions in this state of not a hundred years existence.

*Control of Litigation.* Much of the delay and waste that exists in the present system of remedial law is caused by the unrestricted freedom allowed the litigant to control his action or defense. From its commencement to its dismissal or final determination, an action is almost within the exclusive control of the parties

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<sup>1</sup>Of the Illinois Bar.

or of their attorneys. For many months these actions remain upon the records of our courts, for no legitimate reason, than to clog the administration of justice. When this state was sparsely settled and litigation was limited, the free control of a person's action or of his defense was justifiable. With the great multiplicity of law suits, the freedom of the litigant is no longer a personal right, and must be restricted to harmonize with the rights of others. The practice, however, of conducting general calls of calendars to determine the status of a case, when a great number of cases are dismissed merely for the reason that no one answers "Trial" or "Continue for service," works a great hardship upon the attorneys and serves no useful purpose. These calls compel lawyers to lose an unnecessary amount of time, when the clerk of the court could readily ascertain the actual condition of a case by an inspection of the files and could bring about its dismissal or advancement upon the calendar by correspondence or notice to the parties. The dismissal of a case upon general call requires the hearing of bitterly contested reinstatement proceedings, and is a source of positive injustice to litigants.

*Pleading.* Neither the common law, statutes, nor codes require of a pleader more than to state his cause of action, or his defense, in a manner that will apprise his adversary, either from the pleading itself or from the settled law of his state, of what he may be called upon to prove or to disprove upon the trial. Anyone who goes beyond this requirement is acting outside of the strict rules of pleading and is committing a wrong upon some of the parties in the case as well as upon the public. When there was no statute of amendments and jeofails and when the means of ascertaining the true facts of a controversy was extremely difficult, there was some reason for a careful pleader to state his action or his special defense so completely and in so many different ways as to meet every conceivable or possible circumstance. But now, all matters of importance are carried on in writing and there is ample original or secondary evidence from which the facts may be fully ascertained; and, therefore, the common law mode of pleading a cause of action or of a special defense in many different ways has no justification. From a careful study of cases it can be observed readily that numerous pleadings are drawn with no proper conception of what may and what may not be proved under them. It can be safely said that every case turns upon a clear and sufficient understanding of the issues involved at some stage of its progress, and that litigants either win or lose their cases according to the right or

the wrong grasp by counsel, judge, or jury of the real issue in controversy. Under the Illinois Practice Act there is absolutely no excuse for filing more than one count or more than one special plea. If a slightly different cause of an action or of a defense from the one presented is developed upon the trial, the variance can always be cured by an amendment of the pleadings granted as a matter of course after all of the testimony has been introduced, where an objection on account of variance has been made. If no objection has been interposed the variance is considered as having been waived. Cases which involve a technical issue, or which require the disposition of a demurrer to a declaration or to a plea should follow the practice of code states by requiring the party who raises the technical issue to anticipate the court's action and to be prepared to file immediately upon the disposition of the preliminary issue, any subsequent pleading.

*The Declaration.* As far back as 1857, the Supreme Court in these words voiced the tendency of the times:

"The more enlightened course adopted by modern courts, which looks to the substance of the pleading, for the purpose of seeing that the defendant is duly apprised of the complaint against him, that he may not be taken by surprise upon the trial, conduces more to the substantial ends of justice than those technical rules upon which ancient jurists seemed to pride themselves."

This is not the first nor the last expression of our highest court that indicates its willingness to encourage simple pleading. Our reports contain many a rebuke to a frivolous pleader. Yet it is common practice in this state to cumber the records with a variety of useless pleadings which merely restate a single cause of action. In a certain case which we have in mind the declaration consisted of three counts, each count stating the same negligence in varying detail. It subsequently developed that a single count would have been sufficient and would have saved the case from going to the Supreme Court. Another instance of useless repetition and clumsy pleading was where a declaration contained two special counts and consolidated common counts. The consolidated common counts were absolutely useless. The two special counts were subsequently rewritten, word for word, in what was termed additional counts. As the pleadings thus stood it would have been a difficult task to determine the precise nature of the plaintiff's claim.

Every declaration should allege, once and only once, all of the essential facts that are necessary to establish a *prima facie* case. Limiting the number of counts to a single count will appreciably reduce the work of the Appellate and Supreme Courts, and save

them from the unnecessary burden of reviewing a declaration to see whether the evidence sustains the right cause of action. With pleadings drawn as they are now we must have someone at our elbow to compare the different counts in order to determine in what particular they differ. This is not only a waste of time, but it is a great inconvenience. A single comprehensive count will do away with this useless expenditure of time and energy, and reduce the cost of law suits.

*Plea and Replication.* The plea of general issue or that of not guilty interposable to the various forms of actions has become an objectionable pleading to the modern lawyer; and yet to those who are looking for simplicity nothing could be devised that was more simple. The effectiveness of this plea can only be appreciated by those who possess a definite knowledge of what may and what may not be proven under it. No general denial is rightfully permitted where the defense is special. But no more than one special plea should be allowed. This plea should allege every fact which is necessary to prove to overcome the plaintiffs' *prima facie* case, and the facts should be adequately stated to apprise the plaintiff sufficiently of the nature of the particular defense that is sought to be interposed. In a case where twenty-four pleas were filed to a declaration substantially containing one count and two breaches, it was justly said by the reviewing court:

"The filing of the numerous pleadings subsequent to the declaration was preposterous and it would be a waste of time of this court, in an opinion, to take up and consider seriatim the action of the trial court in disposing of forty-eight demurrers which appear in the record."

When two or more defendants have the same defense they should plead jointly, if they are represented by the same counsel; and if they are not so represented, one of them should, by a short plea, adopt the plea of his co-defendant. Should the co-defendant be dismissed out of court, there should be entered an order reserving the remaining defendant's rights under the plea on file. A similar course should be pursued in special taxation or special assessment matters. No cumulative objections should be permitted. All parties should either agree, beforehand, upon the kind and number of objections they expect to file, or else parties who appear subsequently, should adopt the objections filed by the first party and should only present such additional objections as the first party had failed to file.

Replications which merely deny a plea, without setting up new matter or reassigning, should not repeat, in negative form, the

material allegations of the plea, but should deny in one general allegation each and every one of the allegations of the plea.

*Practice.* The practice of the federal judges of asking questions of counsel during argument and of bringing out the point or points upon which the judge has any doubt should be adopted by the state judiciary in every one of its courts. In this way, all discussion of principles that are well settled, and points in the case that are sufficiently clear to the judge, could be eliminated, at a great saving of time.

Reviewing courts should discourage frivolous assignments of error, all cumulative assignments, and all assignments of error which involve points that have been settled by prior decisions. The work which is now being done by the Supreme Court in granting or in refusing writs of *certiorari* should be lessened by *nisi prius* judges. These judges should be in a position to determine whether or not an appeal or a writ of error would be effectual, and should grant the appeal or writ only in cases of reasonable doubt as to the soundness of the particular proposition or point raised.

*Bench and Bar.* The state judiciary, and not the attorneys at its bar, is the most natural source to look to for reform in practice. The judges, of necessity, have a deeper experience and a wider view of actual conditions. It was the judges who made it possible to have the common law system of pleading, and it is the judges who can modify, extend or limit that form of pleading and make it applicable to modern conditions. Precept or rule that springs from the common law is founded upon the solid rock of human nature and experience. Judges see more of human nature than any other body of men and as a rule possess an invaluable amount of experience. They administer our laws and to them we should turn for reform in all remedial laws. No principle of law administration is better settled than the one which gives power to courts to establish rules of practice to facilitate their business. This should not prevent lawyers, as individuals or as members of bar associations, from making useful suggestions to the courts with reference to desirable changes in practice. But it should be left to the courts to pass upon these suggestions and to approve of them.

There might be a serious question as to whether, to secure uniformity, the ultimate power to approve rules of practice should be lodged with the highest court of the state. One objection to this plan is that courts of last resort, with perhaps not a single exception, have been and are today considerably overworked. Since

1851, the Supreme Court of Michigan has had power, under the statute, to make, revise and amend, if necessary, rules of court for circuit courts for the purpose of attaining the following results:

"(1) the abolishing of distinctions between law and equity proceedings, as far as practicable; (2) the abolishing of all fictions and unnecessary process and proceedings; (3) the simplyfying and abbreviating of the pleadings and proceedings; (4) the expediting of decisions of causes; (5) the regulation of costs; (6) the remedying of such abuses and imperfections as may be found to exist in the practice; (7) the abolishing of all unnecessary forms and technicalities in pleading and practice; (8) to effectually prevent the defeat or abatement of any civil suit, *ex contra*, for either any nonjoinder or misjoinder of parties, where the same can be done consistently with justice; (9) to provide for necessary amendments of process, pleadings or other proceedings in such cases; and (10) to provide the manner by which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court."

While very little complaint has been heard from Michigan lawyers concerning the practical operation of this program, their records do not disclose a material improvement in procedure.

As rules of practice embrace the entire procedure of the state and affect every one of its courts, why should not all of our judges of courts of record be required to participate in formulating these rules? One way in which this could be accomplished is by a state association of judges who should meet regularly to discuss matters of procedure and to promulgate rules of practice. This would merely be an extension of the practice of judges of one court conferring with reference to its matters, to judges of all courts of record sitting in conference on matters involving all the courts of the state. Wherever judges have heretofore combined for this purpose, the results have been most successful. And the larger and the more perfect the association, the more good will come of it.

*The Remedy.* As has been intimated, the agitation for a reformed procedure has brought forth in profusion suggestions and plans for a new system. Some suggest the entire destruction of our present practice and the substitution of an entirely new procedure, preferably a practice act based on the Judicature Acts of England. Other recommendations are too indefinite. The lawyer is by training and experience extremely cautious. His profession should be the last to adopt radical changes or to import foreign methods that are entirely unsuited to American institutions and conditions. Instead of making sweeping changes, we should place

greater confidence in our courts and extend to them a more thorough co-operation. In the common law we have a permanent basis for future action. All that is necessary is to retain that which is best and indispensable and to reject that which is useless and inapplicable. We must evolve a modern system of procedure that shall be uniform in all courts and in all counties of the state. The problem of the true reformer is to discover, separate, preserve, and make available all that has been found of value by the actual test of experience. The main purpose of procedure is to clearly and speedily bring up the controversial issue for decision. To do this, a simple and effective procedure is absolutely essential. Rules of pleading alone are insufficient for this purpose; there must be a union of pleading and practice to complete the procedure of every court. It is a serious question whether the legislature is the proper agency to create such a system.

The evolution of a proper practice act or that of a code must take many years of the combined efforts of lawyers, of judges, and of legislators. It cannot be accomplished within an arbitrarily fixed period of time and by only one of the three classes interested. Any distinct and important change in practice, if made by the legislature alone, would not be quite safe to follow until tested and settled in the courts; whereas changes in procedure that would come from a united judiciary would be clearly and thoroughly understood. It is believed that the following program can be carried out by a state-wide association of judges, without the necessity of legislation, and thereby materially simplify procedure, and avoid the waste and the delays of which the courts are now unjustly accused:

1. Substitute a simple commencement and conclusion for the one now in use in a declaration, a demurrer, a plea, a replication, a rejoinder, etc. Retain forms, or parts of forms, that serve an actual purpose, and discard all forms or parts of forms that are useless.

2. The object of prescribing forms should be merely to provide a means for stating facts that reasonably make a *prima facie* case, or of a general cause of action or of a defense. No general form can be prescribed in advance for causes of action or for defenses that necessarily arise out of special circumstances or special facts.

3. Causes and defenses that may be now or hereafter joined in one action, or that may be interposed as one defense to the action, should be set forth in enumerated paragraphs, in a single count, plea, replication, etc.



4. Let the clerk of each court see to it that cases are promptly put at issue or dismissed according to the strict rules of practice; and so to arrange the calendar that there will be fewer continuances and more "live" cases for the judge to pass upon or to try.

5. General instructions should be simple and clear statements of the law applicable to the case, without attempting to single out certain facts or a part of the evidence. Hypothetical instructions should be clear and should contain a full statement of all of the ultimate proved facts.

6. It should not be necessary, in civil cases, to file in the reviewing court, either the original or a transcript of the record unless the parties or their attorneys consider such a transcript essential to a proper disposition of the case and the trial judge so certifies.

7. Reserve the liberty of the litigant, but make him pay for unnecessary contention and for an abuse of his freedom.

8. Litigation at best is a great hardship and a misfortune; reduce that misfortune to a minimum through an efficient administration of the court.

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## COMMENT ON RECENT CASES

**WILLS—CONSTRUCTION—MEANING OF AN ULTIMATE GIFT OF THE TESTATOR'S "ESTATE."**—In *Downing v. Grigsby*, 251 Ill. 568, the will involved, devised to the wife for life and "at her death to revert to my estate," with a residuary devise of one-half to the wife, and one-half to others. The wife filed a bill for partition subject to the life estate, claiming one-half under the residuary clause. A decree for the wife was affirmed.

The primary meaning of "revert to my estate" was held to be "fall into the residue," and no good reason appeared why that primary meaning should not obtain. It was apparently urged in favor of the secondary meaning that the primary meaning resulted in the absurdity or incongruity that the widow, who was given a

life estate in the whole, would also take half in remainder. To this the court significantly replied: (p. 574): "but there is nothing inherently absurd in a testator's giving to one of several to whom a fee is devised the enjoyment of the whole property during his lifetime, or to a life tenant of the whole a share of the fee in remainder." This is entirely consistent with the line of cases where in a gift to "heirs at law" of the testator after a life estate, the fact that the life tenant is one of the heirs at law and so entitled to share in the remainder if heirs at law be taken in its primary meaning, is not sufficient to warrant giving to heirs at law a secondary meaning which includes those who would have been the testator's heirs at law if he had died at the time of the death of the life tenant: *Kales*, "F. I." Sec. 233.

A. M. K.

**WILLS—ATTESTATION.**—In *Smith v. Goodell*, 258 Ill. 145, we have another example of a will failing entirely because of the incompetency of a witness. One witness was the partner of the person named as executor and the articles of partnership divided all fees earned as executor by either partner. As the executor was incompetent by reason of his interest: (*Jones v. Grieser*, 238 Ill. 183; *Fearn v. Postlethwaite*, 240 Ill. 626), the partner of the executor, who was entitled to part of the executor's fees, was incompetent. [See 11 ILLINOIS LAW REVIEW 207].

It was also held that the situation was not aided by section 8 of the Wills Act, because the witness' interest was indirect, while the statute only made the witness directly interested under the terms of the will competent, by eliminating his interest. Such has been the regular holding of our Supreme Court in the cases where a spouse of the legatee or executor is a witness. In such cases the will fails entirely because section 8 does not apply: (*Fearn v. Postlethwaite*, 240 Ill. 626; *Sloan v. Sloan*, 184 Ill. 579; *Fisher v. Spence*, 150 Ill. 253). This naturally suggests a change in the law of this state along the lines of section 15 of the Wills Act of I Vict. Such an act to take the place of the Wills Act might read as follows:

If any person shall attest the execution of any will to whom, or to whose wife or husband or partner, any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband or partner of such person, or any person claiming under such person or wife or husband or partner, be utterly null and void and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

A. M. K.

**PARTITION—JOINT TENANCIES.**—In *Barr v. Barr*, 273 Ill. 621, the state Supreme Court holds that section 5 of the conveyance act, providing that joint tenancies may be created in the mode there pointed out, does not repeal section 1 of the partition act, providing that land "held in joint tenancy, tenancy in common or coparce-

nary," shall be subject to partition by bill in chancery or petition. The court says that section 5 simply gives the privilege of creating joint tenancies in a certain way, and the partition statute gives the joint tenants the privilege of partitioning after the joint tenancy is created.

The court points out that joint tenancies were, at common law, subject to destruction (i. e. conversion into tenancies in common) by "severance." Hence the provision for the destruction of joint tenancies by partition could not be deemed to be so in conflict with the act for the creation of joint tenancies that the latter act repealed the former. The result seems obviously sound.

L. M. G.

**LIFE INSURANCE—WHEN COMPANY IS NOT BOUND BY INCORRECT APPLICATION PREPARED BY ITS AGENT.**—An interesting and important phase of estoppel and waiver in life insurance relates to the effect of incorrect statements in the application for the policy due to the error or fraud of the agent or medical examiner of the company in preparing the application. A general statement of the rule is that the company is estopped from claiming a breach of warranty or a misrepresentation in such cases where the statements as written by the agent do not correspond with the information given by the applicant, or where the application is filled out by the agent from his own knowledge, no information being sought from the applicant; although this rule has been rejected in some jurisdictions, notably in Massachusetts and the law courts of New Jersey, where it is claimed that such doctrine is a violation of the parol evidence rule. (See cases collected in *Cooley*, "Briefs on Insurance," Vol. III, pages 2555-2566).

One of the leading authorities in support of the general rule above stated is the United States Supreme Court in the case of *Union Mutual Insurance Company v. Wilkinson* (1871), 13 Wall. 222, in which the application was shown to have been prepared by the agent from erroneous information furnished by a third party, there being no imputation of bad faith against either the agent or the applicant. The court held, in an opinion which discussed at some length the practical conduct of the life insurance business, that the company was estopped from relying upon the breach of warranty on the ground that the acts of the agent in preparing the application were within the scope of his apparent authority and binding upon the company, and, further, that no violation of the parol evidence rule was involved, but rather an estoppel of the company from using the incorrect statements as those of the applicant.

The rule in the *Wilkinson* case has been followed in other cases in the United States Supreme Court, and by the majority of the state courts, including Illinois (*Phenix Ins. Co. v. Stocks* (1893), 149 Ill. 319); but some of the later cases have materially narrowed its scope and effect by emphasizing the necessity of the element of good faith on the part of both the agent and the applicant, although

not always agreeing as to what amounts to good faith in such circumstances. In *New York Life Ins. Co. v. Fletcher* (1885), 117 U. S. 519, it was held that where the application contained a specific limitation of the authority of the agent, and where the assured was able, and had full opportunity, to read the application, his failure to do so was such inexcusable negligence as to prevent his claiming the benefit of the rule in the *Wilkinson case*; the court approving the case of *Ryan v. World Mutual Life Ins. Co.* (1874), 41 Conn. 168, in which it was said that where the agent is guilty of fraud in preparing the application, it cannot be claimed that he is acting within the scope of his authority, and that the beneficiary could not profit by the agent's fraud, whether the applicant was an accomplice, or a mere instrument through negligence in failing to read the application.

This question was again before the United States Supreme Court in the recent case of *Mutual Life Insurance Company v. Hilton-Green et al.* (June 12, 1916), 36 Sup. Ct. Rep. 676, in which it appeared that the application containing certain untrue statements relating to material facts (which were declared by the policy to be representations, and not warranties, in the absence of fraud), was prepared by the agent and medical examiners regardless of the facts, and contained a certificate of examination by the medical examiners, although no such examination was in fact made, the beneficiary claiming, however, that the agent and medical examiners knew the facts, apparently from a previous application to another company. The court, with Pitney, J., dissenting, held that the trial court should have directed a verdict for the company; that the rule by which a principal is bound by the acts and knowledge of his agent does not apply in favor of a third party, where the latter is acquainted with facts plainly indicating that such acts and knowledge will not be communicated to the principal; and that the assured, by failing to repudiate the false representations, adopted and approved them. The latter statement would seem to leave the rule in the *Wilkinson case* with very doubtful present value, and, in any event, such rule appears to have no application in the United States Supreme Court where the agent is guilty of fraud under circumstances like those in the principal case.

The Illinois cases follow the general rule that no recovery is possible where the applicant is guilty of collusion with the agent in preparing the application (*Rockford Ins. Co. v. Nelson* (1872), 65 Ill. 415), but do not seem to refuse to apply the general rule above mentioned merely because of the failure of the assured to read the application (*Royal Neighbors v. Boman* (1898), 177 Ill. 27; *Johnson v. Royal Neighbors* (1912), 253 Ill. 570).

The refusal of the court in the principal case to give any controlling effect to the Florida statute providing that any person receiving or transmitting moneys for or to an insurance company shall be deemed the agent of such company appears to be in accordance with the better considered cases (*John R. Davis Lumber Co. v.*

*Hartford Fire Ins. Co.* (1897), 95 Wis. 226); although the Illinois statute (*R. S. chap. 73, sec. 33*) has been otherwise applied by our Supreme Court (*Continental Ins. Co. v. Ruckman*, 127 Ill. 364).  
H. C. H.

RESIDENCE OF CORPORATIONS.—*Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642. This case was appealed from the Southern District of Illinois and involves the question of the validity of a chattel mortgage given by a corporation as against its trustee in bankruptcy. The Illinois chattel mortgage act provides that such mortgages shall not be valid as against third parties unless possession remains in the grantee, or the instrument provides for possession to remain with the grantor and is acknowledged and recorded in "the county where the mortgagor resides." The mortgagor corporation in this case was incorporated in Illinois under the general act. The statement filed by the organizers gave the location of the principal office as in the city of Chicago. A license was issued to the commissioners to open books; when the commissioners made their report they recited that the postoffice address of the business office of the company was at number ——— Park Hotel, in the city of Beardstown, Cass County. The corporation transacted its business in Cass County. The chattel mortgage in question was recorded in Cass County and not in Cook County. The court held that the statement of the organizers as to the location of the "principal office" determined the residence of the corporation to be in Cook County irrespective of the subsequent statement of the commissioners as to the postoffice address of its "business office;" and that the chattel mortgage was therefore invalid.

The decision seems to follow the previous authorities on this subject. It is not of great general importance. In the service of process on corporations residence is of little account because that subject is governed by special provisions of the practice act. It has, however, a bearing upon the question of the taxation of personal property of corporations. For here the statute provides that personal property shall be assessed where the owner resides and that the capital stock and franchises of corporations shall be assessed where the principal office or place of business of the corporation is located. Thus when our Supreme Court in *Ottawa Gas Light Co. v. People*, 138 Ill. 336, said that the personal property of a corporation is to be listed at the "domicile" of the owner, this probably must now be construed to mean the location of its principal office as shown by the application for incorporation, whether the corporation is doing business at that point or not. These rules with regard to residence, domicile, and principal and business office are thus somewhat cumbersome.

Section 13 of the revenue law, passed since the decision in the *Ottawa case*, provides with reference to insurance companies that, "The place where its office is located in its articles of incorporation shall be deemed its residence, provided its business is actually transacted at such office; but if it shall establish its principal office in any other place than the

place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its residence for all the purposes of this act."

In view of this reasonable provision it seems altogether possible that in the principal case the court might have decided the chattel mortgage good, if section 13 had been given careful consideration. For while this technically does not define the residence of any corporation except that of insurance companies for the purpose of taxation, it might well be considered a statement by the Legislature of its intention in the use of the word "residence" as applied to corporations in the chattel mortgage act as well as in that part of the revenue law which provides for the assessment of personal property.

W. B. H.

**PUBLIC UTILITY DISTINGUISHED FROM PRIVATE BUSINESS—TEST OF PUBLIC PROFESSION—COLD STORAGE WAREHOUSE—MUTUAL TELEPHONES—TAXICAB SERVICE.**—In three decisions our Supreme Court has interpreted the meaning of the term "public utility" as used in the public utilities law of 1913: *Public Utilities Com. v. Monarch Refrigerating Co.*, 267 Ill. 528; *Utilities Com. v. Noble Tel. Co.*, 268 Ill. 411; *Utilities Com. v. Bethany Tel. Assn.*, 270 Ill. 183. In the *Monarch* case it was said to be inconceivable that it was intended by the legislature to leave out, as not subject to regulation, any business in this state which might be termed a public utility (p. 538). The rule was also correctly stated, that whether a business is a public utility depends not upon legislative definition, but upon the public character of the business (p. 543). Thus, it may be understood that what constitutes a public utility in Illinois depends not on statutory construction but upon the common law.

In the *Monarch* case a cold storage warehouse was held to be a public utility; that is to say, it was held that the business of a cold storage warehouse is so charged with a public interest as to bring it within the class of public employments. The court treated the business as one of recent origin and said that it was just as indispensable an agency of commerce as the railroad, the telegraph or the telephone. The reasoning follows in the main the doctrine of the *Munn* case (94 U. S. 113), and of the *Budd* case (143 U. S. 517), which are the leading cases applying the principle of public employments to grain warehouses.

The opinion recognizes that the scope of public employments is subject to enlargement as social and economic conditions undergo change. It is important for its reiteration of the doctrine that the nature of the business itself and the public dependence on the service furnished is the test of public character, and not the legislative declaration thereof.

The *Bethany* and *Noble Telephone* cases involved a determination of whether the companies involved were public or private undertakings. In the *Noble* case the answer was in the affirmative; in the *Bethany* case, in the negative. The *Bethany* case was decided

on the principle that the charter of a company determines the character of its business. This is clearly an unsound precedent, just as is the subsequent declaration that the grant of a license to use the village streets for pole lines and wires, and the acceptance thereof by the company, does not affect the character of the business. The better rule is the one stated by the Supreme Court of the United States that "the important thing is what it does and not what its charter says" (*Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, P. U. R. 1916 D, 92, 93).

In the *Noble case*, which antedates the *Bethany case*, the decision was based on what the company did and on its franchise or license to use the village streets. It appears from a reading of both decisions that the charter of each company limited service to members of the association. The *Noble* company, however, had connections with a number of independently owned lines and its local license was conditioned on the right of any resident of the village to become a member of the association on the payment of the regularly established fees. The company also agreed to maintain a telephone in the village hall. So far as the opinion shows, however, the company had no right by its charter to serve anyone other than its members. If the municipal ordinance was effective to determine public character in the one case, it should have been equally effective in the other. Nor should the fact that the members of the *Noble* company were enabled by connections with other lines to communicate with persons who were not members have affected the character of the business, under the rule of the *Bethany case*, unless it appeared that the charter of the company permitted such connections to be made.

A principle recognized by the opinions in both cases is that the business may be public although it is not conducted for profit, but for the mutual benefit of its members.

The objection to the rule of the *Bethany case* is that it invites abuse and places the determination of whether a business is public or not on a wholly artificial basis. It is like accepting the declaration of innocence of the indicted man as proof in a criminal prosecution instead of the testimony of the eye-witnesses of the crime. If the business conducted is in fact public it should be so treated, although the company has exceeded its charter powers.

The *Terminal Taxicab Co. case*, *supra*, presents three situations. It arose under the public utilities law of the District of Columbia, the company contesting an order of the district commission on the ground that it was a common carrier, within the definition of the statute. The case turned entirely on the common law obligations of the company as evidenced by the business conducted.

Part of the business of the company was to carry incoming railroad passengers away from the union station. It was conducted under a contract with the station company, which obliged the taxicab company to provide an adequate number of cabs to accom-



moderate the patronage at the station and to serve all applicants for cab service. This business was held to be public.

Another part of the business was hotel service, furnished under contracts with the hotels, which contracts required the company to furnish cabs for hotel guests, and gave the exclusive right of solicitation in and about the hotels to the company. Because any member of the public may become a hotel guest, it was thought that this business was public.

The third part of the business consisted of a livery or garage service. The company provided cabs for the use of individuals on orders delivered to the garage in person or by telephone. Although it appeared that the charges tended to uniformity, nevertheless individual contracts were made in the case of each hiring. The company advertised this service extensively, but it reserved the power by implication to reject any applicant if his credit were not deemed good. As to this business the holding was that it was not public, and hence that the commission could have no jurisdiction over it.

We are inclined to believe that the reasoning on the last point is not as satisfactory as it might be. There seems to be a practical distinction between the livery service of the horse stable and the personal service of the modern taxicab company in a large city. Judged by the standards of the Illinois cases reviewed herein, this business is at least very close to the border line of a public profession. In the *Monarch* case it appeared that individual contracts were made whenever goods were stored, and furthermore that there was not entire uniformity of charges. It is well-established law that a person engaged in a public profession may by rule or regulation adopted in advance require payment or security for payment before rendering service.

This case should not be regarded as having controlling force in the several states, beyond the logic of its reasoning. Whether a business is public or not is clearly a matter of domestic law and presents no federal issue.

The group of cases reviewed tends to revive interest in the ultimate scope and application of the peculiar law of public undertakings. They illustrate that the law is not fixed, that constitutional power to regulate business under public service doctrines depends not on statutory declarations but on common law, and that the determining factor in most cases is the comfort, convenience, and general welfare of some class, group or community of the public.

W. D. K.

**RESTRICTIVE COVENANTS—DOCTRINE OF VAN SANT V. ROSE—PROOF OF ACTUAL DAMAGE.**—Is the Supreme Court receding from the position taken in the case of *Van Sant v. Rose*, 260 Ill. 401, 9 ILLINOIS LAW REVIEW 58? That case indicated that it was sufficient to give equity jurisdiction to enforce a restrictive covenant, that it be one concerning real estate of the defendant, and that the

defendant have notice of it. It is submitted the recent case of *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999, would serve very well as a foundation for a gradual departure from that rule.

In *Loomis v. Collins*, a plot of ground was subdivided, the plot showing various streets and the same building line on each street. Houses were built on various of the streets, and sold to different persons. The complainants obtained lots on one of the streets and their deed contained, among other restrictions, an express restriction against building any but dwelling houses, and a covenant by the grantor that the same restrictions would be inserted in deeds of other lots on the same street. The defendant bought property on another street, on which no lots had yet been sold and no buildings erected. Defendant's deed contained a restriction substantially different from that of complainants', and permitted him to build an apartment building with sun porches over the line which appeared on the plat. On the theory that this was in violation of the general scheme according to which the lots in the subdivision were sold, complainants brought their bill to enjoin the construction of such an apartment building and particularly the building of closed porches over the line fixed in the plat.

The court resolved the situation into two questions: (1), Did the building line on the plat create a restriction in favor of any but owners on the same street; and, (2), if it did, were the complainants, who were owners on a different street from the defendant, in a position to enforce the same?

Upon the first question, the court starts with the proposition that parties seeking to enforce such a restriction "must have some right and interest in its observance by those against whom they seek to enforce it." Such a right and interest, apparently, must be one affecting the enjoyment of related property. Thus in this case, the object of the restriction was to insure an "easement" of light, air, and view; and the violation of a building line on another street could not have the effect of violating it. To the extent that this would seem to call for an adjacent or related estate by the complainants, the tendency to depart from the rule of *Van Sant v. Rose* would seem inferable.

This theory would render unnecessary any answer to the second question. However, the court does go into the question of defendant's right to maintain the closed porches he was building, and concludes that the distinction between an open porch and a closed one was a matter of degree only. However, a degree of enclosure of a porch that interfered with the "easement" of light, air, and view, it is suggested, could be enjoined. Upon this question of degree, apparently, proof of actual damage and inconvenience to defendant and benefit to the complainant was material. In fact the language of the court would imply that the rule excluding the question of actual damages in enforcing a restrictive covenant applies only in case of express covenants. This, it is believed, is not well founded, for actual damages are commonly unimportant,

because in an interference with the enjoyment of real estate, the various elements of sight, view, location, and exclusiveness of design and architecture, are all important, yet, at the same time, not to be measured in damages.

It is submitted that the court has overlooked the real theory of enforcement of restrictive covenants, and placed them on a purely commercial basis; whereas the question of enjoyment of such covenants is purely personal to the property owners and may involve even the esthetic sense; and unless the property owners have by their own act released their right to insist upon the performance of the covenant, as by consenting to other violations, or by themselves violating it, it is not for the court to weigh the question of injury and benefit: *Ewertsen v. Gerstenberg*, 186 Ill. 344; *Curtis v. Rubin*, 244 Ill. 88; *Kneip v. Schroeder*, 255 Ill. 624; *Weigman v. Kusel*, 271 Ill. 526. Indeed, even upon the theory of estoppel, it would seem that one had sufficiently changed his position by purchasing property in reliance upon a restriction noted on a plat to be able to insist upon the surroundings remaining as represented by the plat. It is true, the case of *Consolidated Coal Co. v. Schmisser*, 135 Ill. 378, does treat the rule as applied to express covenants, but in that case there was not even an implied covenant, and the reason for the rule, viz., that the property owner is not required to submit to the opinions of others as to whether he will or will not suffer substantial injury, bears out such construction.

E. M. L.

**COMPENSATION ACT—RIGHTS OF NON-RESIDENT ALIEN DEPENDENTS THEREUNDER.**—In the case of *Victor Chemical Works v. Industrial Board*, (113 N. E. 173), our Supreme Court has settled a point which has been in dispute ever since the enactment of a compensation law in this state, namely, whether non-resident alien dependents are entitled to the benefit of the provisions of that act. Two previous decisions in this State: (see *Coal Co. v. Petraytis*, 195 Ill. 215; *Guianos v. Coal Co.*, 242 Ill. 278), have decided that non-resident aliens are entitled to the benefits of the mining statutes of this state. The court cited these cases and approved them. The court decided in the principal case that non-resident aliens are entitled to the benefits of the compensation act on the ground that the legislature intended that such persons should receive the benefit of the act; and gives as its principal reasons the fact that the law provides that the term "employee," as used in the act, shall be construed to mean,

"Every person in the service of another under contract or hire, express or implied, oral or written, including aliens, and minors, etc."

The reason given seems valid to the writer, but there is another very strong reason in support of the decision. The treaty between this country and Italy was amended in 1913 with the evident intent to prevent discrimination against the non-resident alien dependents of Italian workmen in the compensation acts and other similar laws of our states, and should have great weight with any court in a

question of this kind. The strength of this treaty is shown by the fact that in the state of Michigan, the proposed compensation bill had a clause discriminating against the non-resident dependents of alien workmen. This treaty was brought to the attention of the judiciary committee of the House of Representatives by the royal Italian consul at Chicago, through his attorney, and immediately the discriminating clause was stricken from the bill. It is also well to note that this treaty may be of service to the non-resident alien dependents of countries other than Italy by reason of the most-favored-nation clause that is contained in most of our treaties with other nations. In addition to the strictly legal reasons for the decisions, it also may be supported on the ground of broad humanitarianism, concerning which we have heard so much of late. Any discrimination in these laws against non-resident alien dependents would be against the spirit of the law itself, and against the general practice of the members of the family of nations in enacting and putting into effect laws of this kind. Further, such discrimination would be direct discrimination against the workman whose family resides with him here in America, because it would be a saving to the employer if he hired only alien labor whose dependents resided abroad.

I. E. W.

**THE NATURAL OBJECTS OF ONE'S BOUNTY.**—With an iteration like the Raven's croaking, the phrase "natural objects of one's bounty" occurs again and again in the law and literature of wills. One would think from such constant repetition that the words would have long ago acquired a meaning as fixed and formal as the "to A and his heirs" in deeds. In the thousands of cases brought by sore sons and disgruntled daughters over the "poor allottery my father left me by testament" juries are constantly informed that the touchstone of testamentary capacity is a mind capable of remembering the "natural objects of his bounty." Yet seldom, if ever, does His Honor tell the untutored twelve who those objects are. With unwonted confidence the Bench assumes that the Box needs no instruction on the point. As a result, an important matter is left to guesswork.

The courts of review have apparently thought this phrase to be among those truths which are self-evident. For the writer has been unable to find a case which attempts to define it in a satisfactory way. "Words and Phrases," for example, contains but one definition of the term. However, the books are full of phrases which the courts have assumed to be its equivalent. And what a remarkable crazy quilt they make. Thus, for example, we find that in order for the testator to possess what my lord Coke calls a "disposing memory," he must have a mind capable of understanding "all the persons who come reasonably within the range of his bounty," "his relation to the natural objects of his bounty," "of recollecting, discussing and feeling the relations, connections and obligations of family and blood," "those who naturally have some claim to his remembrance," "the persons related to him by the ties

of blood and affection," "those whom he is excluding from all participation in his property," "persons who might naturally expect to become the objects of his bounty," or "would naturally be supposed to be the objects of his bounty," "those bound to him by the ties of blood and therefore the natural objects of his bounty," "those who were his kindred," "those who would be his heirs-at-law if no will were made," and finally, as the acme of indefiniteness we find in the celebrated case of *Delafield v. Parish*, 25 N. Y. 9, that the testator must know the "persons who were, or should, or might have been the objects of his bounty." In very truth, no will case hath a brother.

No summer cloud assumes more Protean shapes than the objects of ones bounty do in the potter's hands of justice. The determining factors are blood (for is not blood thicker than water?); family (a mother-in-law, perhaps?), "near kindred (how near?); affection (for strangers?); legal heirs to the *n*th degree of consanguinity, direct and collateral (a test which in some instances would unnerve the hardiest of Quaker City jurists), those amiable Micawbers who "suppose" or "naturally expect" themselves to be remembered, and finally, those persons whom some jury, not the testator, shall say "were, or should, or might have been" the objects of his bounty.

Is it possible from this babel of terms to fashion a definition of testamentary capacity that shall be at once practical, certain, rational, and just both to the individual testator and the state?

The Supreme Court of Indiana has recently discussed the point. The case is *Breadheft v. Cleveland*, 108 N. E. 5; 110 N. E. 662, and was decided by a 3 to 2 vote. Without attempting a comprehensive definition of the phrase, the court arrives at the remarkable conclusion that the law will not recognize an only son as the natural object of bounty; in other words, no person is a natural object of the testator's bounty unless the jury says he is.

The instruction given by the trial court in that case was as follows:

*"When a woman dies leaving a son surviving her, and leaves no husband and no descendants of any deceased child or children, the law would recognize her son as the natural object of her bounty when she executes her last will and testament, and if without reason she either wholly or to a considerable extent disinherits such child, such conduct upon the testatrix's part becomes a part of the evidence which the jury trying a will contest have the right to consider, if the unsoundness of mind of such testatrix is alleged in such contest."*

The italicized portion of the above instruction was held error as invading the province of the jury. Another instruction in the case gave as a measure of testamentary capacity, intelligence and reason of sufficient strength "to know . . . the number and names of those who are the natural objects of her bounty." The former instruction, it will be seen, attempts to define the meaning of the latter.

In support of its conclusion the court, on rehearing, argues as follows: By natural object is not meant the legal object recognized by the law of descent, for the power and purpose to disregard some canon of descent is necessarily implied in the making of any will. The jury is to determine what the testator might have reasonably been expected to have done when subject to no influence except that of nature, with its own rules of duty and justice. If the jury find that the testator has selected objects of his bounty different from those designated by natural laws, such fact, involving unnatural conduct, may be considered in determining his sanity. A will is not necessarily unnatural because it discriminates among the heirs, or gives the property to strangers.

The two dissenting judges must have found considerable fault with this reasoning. In the first place, if the jury are to be instructed that a measure of the testator's capacity to make a will is a mind capable of knowing the "number and names of those who are the natural objects of his bounty" they should also be told who those objects are. An india rubber yard-stick is a sorry tool with which to measure rights.

But there is a worse flaw in the argument. While it is obviously true that it may be perfectly natural in some cases for a testator to prefer a stranger who has been kind to him, to kin who have mistreated him, yet the assertion that such stranger is the natural object of his bounty for the purpose of testing his capacity to make a will, leads at once into difficulties.

Suppose some stranger to the blood of the testator, some business associate, his housekeeper perhaps, who has shown a thousand kindnesses to the testator, and who, by every rule of decency among men that is known to juries, should be remembered and repaid in the testator's will, is not mentioned therein. The testator forgot him and when for the first time he remembered the uncertainty of life, he thought only of wife and children, "those strong knots of love," and left everything to them. Shall we say such will is "unnatural," "undutiful," "devoid of natural duty or affection," and set it aside because the testator in his last moments forgot him whom a jury might "naturally suppose" was the object of his bounty? No, of course not. For such person, for the purpose of determining testamentary capacity was not the natural object of testator's bounty, although it would have been perfectly "natural" to have remembered him in the will.

Suppose the same testator leaves everything to his three children, B, C, and D, but discriminates against D. D contests probate on the ground of a lack of testamentary capacity. In such a case, could D introduce evidence, in proof of incapacity, that his father had failed to remember this third party to whose kindness his father owed everything? The books do not contain a case where such failure to recall such third person and remember his deserts when drawing the will, was allowed as proof of mental incapacity. In other words, the law does not recognize third parties, however

meritorious their claims might be, as the natural objects of testator's bounty in determining testamentary capacity.

Again, suppose the same testator left everything to this third party to whom he, in fact, owed everything, and it could be shown that at the time testator drew his will, his mind was such that he did not know who his children were, or that he did not know he had any children to whom, we will assume, he owed nothing. Is there any question that such a will would be set aside? And why? Because the testator did not have mind and memory sufficient to recognize the "natural objects of his bounty."

No, there are insuperable difficulties to recognizing strangers to the blood of the testator as the natural objects of his bounty for the purpose of determining testamentary capacity. If such third person were recognized as the natural object of his bounty, then in all logic, if he is "left out," he should be permitted to contest the will, set it aside, and share in the estate to the extent to which a jury may think he is equitably entitled, wills and testaments and canons of descent to the contrary notwithstanding.

It will not do, therefore, to include a stranger to the blood of testator as the "natural object of his bounty" in the sense in which those words are used in the definition of testamentary capacity, however natural it might be, under some circumstances, to bequeath a legacy to him. This at once limits our inquiry to family and blood. But it is at once apparent that both family and blood are too broad. "Family" has no satisfactory definition. In the ordinary sense it means those living under a single roof, and presided over by a single head. As such it may include servants, the traditional mother-in-law, an orphan child adopted or not, and others. Obviously, it is not required that the testator have sufficient intellect to recall all members of this group.

Nor does "blood" suffice. For "blood" does not include a husband or wife. And in the sense of "heirs at law," "kindred," or "relatives," or "those whom he is excluding from participation in his estate," the term requires too stringent a test. For example, in *McCarthy's Will*, 126 N. Y. S. 699, testatrix's heirs at law were some 32 first and second cousins scattered over the globe from County Down to Australia, many of whom she had never seen and perhaps did not know were *in esse*. As the court said "the natural objects of bounty have something of the character of a dissolving view."

Circumstances therefore alter cases. Is it possible, then, to arrive at some unalterable principle which will apply in every case? It seems to the writer that such a principle may be formulated as follows: That the natural objects of his bounty whom and whose deserts the law should require every testator to have in mind when he draws his will are bairns and spouse, or grandchildren, if any there be; if not, parents, and failing in this, then such other of his heirs as may be nearest in blood and the obligations of friendship.

The jury should, of course, be instructed that if testator had

sufficient mentality to recognize these objects of his bounty, he has a perfect right to discriminate between them, for

"Shall my father's will be of no force  
"To dispossess that child which is not his?"

or give his property to strangers, and no one can question the propriety of the gift. Subject to this explanation, however, it seems that there can be no objection to requiring testator to think first of wife and child or parents before bestowing his property on strangers, however deserving these strangers may be. Society has a right to say that a father shall not fail to recall the needs of an infant motherless child, or a feeble-minded daughter unable to earn a living and leave her, as was said in *Meier v. Buchter*, 94 S. W. 883, "like a falling autumn leaf, the sport of every ill wind that blows." It is easy, of course, to say that in such an extreme case any jury, *rusticum judicium*, would set aside the will. But this admits the force of the argument,—that such child was a natural object of the father's bounty, not only because it "should have been" or would be "naturally supposed" to be such object, but also, it seems to me, because as a *matter of law*, it was.

In fact, there is much to be said in favor of certain restrictions in testamentary disposition which prevailed in that elder day before the ruthless individualism of the Manchester school of philosophy which has been at once the glory and despair of our civilization began to be so widely recognized. In Glanville's time, 1187, for instance, one could not dispose by testament of more than one-half of his personality if either wife or child were living, or more than one-third if both wife and child survived. In Louisiana and Porto Rico, following the Civil law—and here it may be remarked that no part of our legal structure has been molded by the Civil law more than our law of wills—children and their descendants are "forced heirs," or if there are none, then the testator's parents. For example, the testator can dispose of only two-thirds of his property if he has one child, one-half if two children, one-third if three. Forced heirs can be disinherited only when they have wronged the testator in some manner and the testator in the will must state what the grievance was, which grievance must be statutory. These rules, of course, date back to the Roman law which never regarded a will as an instrument of disherison, but rather to be used when there was no family, or to make a fairer distribution than their rules of intestate succession gave. Under the Roman law, if a child were disinherited he had his remedy in the *querela inofficiosi testamenti* or "plaint of an unduteous will," which gave him his inheritance, not as a matter for the determination of a jury, but as a matter of law, similar to the "forced heirs" of Louisiana. At that time the family, not the individual, was the unit of society. It partook of the nature of a corporation sole. It never died. The patriarch was, indeed, invested with the *universitas juris*, or bundle of rights and duties, but he held them, not in his own right, but as trustee or guardian for his family. When the patriarch died, the



family lived on in the representative capacity of the heir, upon whose shoulders the father's mantle fell.

Sprouts from these old roots are still to be seen. It is the law in nearly all the states that the widow or widower cannot be deprived by will of dower or curtesy, or their equivalents. Marriage or the birth of children revokes the will, unless it makes provision for these contingencies. In one state at least a child not provided for in the will takes his intestate share, unless it is shown that the omission was intentional. Restrictions are also found against leaving more than a certain amount to a mistress or illegitimate child. The source of title also in some cases limits the power of testamentary disposition.

These restrictions are an implied acknowledgment that wife and children are in law, as well as in fact, the natural objects of the testator's bounty.

The twentieth century may not see fit to re-enact, in all their rigidity, the restrictions on testamentary disposition of the civil and early common law. Yet as a simple and just test of a "disposing memory," it may well insist on a mind capable of recalling the names, the needs and the just deserts of wife, child, and parent, or these failing, other near *and dear* relatives, before the will is drawn. While freely recognizing the right of a testator to do with his own as he will, the law can scarcely go wrong, especially in these dissolving days, in safeguarding by any proper means the solidarity of the home and the strengthening of family ties.

SAMUEL B. PETTENGILL.

# BOOKS AND PERIODICALS

## BOOK REVIEWS

EVOLUTION OF LAW SERIES—SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS. Compiled by Albert Kocourek and John H. Wigmore. Boston: Little, Brown and Company, 1915. Volume I. Sources of Ancient and Primitive Law (pp. xvii, 702); and Volume II. Primitive and Ancient Legal Institutions (pp. xii, 704). Volume III. Formative Influences of Legal Development. (To follow.)

These volumes are of the greatest value to the student of law and to the law teacher. They should also be of interest to the practicing lawyer, unless law is to be, not a science, but the veriest mechanical trade. Few citations indeed, will be made to these volumes by trial lawyers. They will furnish no immediate help in winning cases. But just because routine work will lead him away from the study of the evolution of the law, it is as necessary for the so-called practical lawyer to have some grasp of the problems here presented to us, as it is for the teacher of law or for the student of comparative law.

From whatever standpoint we study law, we are likely to be led by the method which we adopt, into making such selections and omissions as prevent us from understanding its real nature and function. If we study law chiefly from the historical point of view, we are likely to think of our Anglo-American law as a system which was evolved by the King's Courts out of nothing in the Twelfth and Thirteenth Centuries, and which developed until the Eighteenth Century, or the early part of the Nineteenth Century; and we are likely to feel that we are studying a historical development which belongs to the past, and in which the present and future have no part. If we begin to study our present system as positive law, we are likely to think of law as drawn on a flat background without perspective; as a system whose doctrines are absolute, positive and a part of the natural order. If we attempt to value law functionally, and to test it by the way in which it actually works in the life about us, we are likely to assume that a knowledge of law is intuitive and instinctive; that any one can extemporize disjointed rules which meet the needs of society; that logic and system are alike unnecessary; that precedents are inherently bad; and that nothing can be learned from the past. This latter attitude is far more likely to be that of the layman, than of one who has studied law, even in the most superficial way. Just because it is the layman's point of view, and because it may become the popular point of view, the danger to the orderly development of our law is so much the greater. A careful study of the sources of ancient and primitive law and of the views of ancient and primitive legal institutions, which are held by the ablest writers and thinkers of the present time, is the best method of avoiding the mistake of judging law from one viewpoint alone. It enables us to understand that continual

set of compromises in adjusting the tradition of the dead past to the imperative needs of living society, of which the administration of justice is composed; and to appreciate that continual attempt to plot the curve of the path of the law and to anticipate its lines of immediate development, which form the task of the lawyer who is called upon to solve the vital questions of modern life.

The collection of sources of primitive and ancient law, which is found in the first volume, is the second attempt to place before the English and American student of the law (who too often cannot or will not read anything about law that is not written in English), the original documents and records, and the traditions which far antedate all documents and records, and which embody the original material of primitive and ancient law, the basis underlying all developed systems.

Much of the material in Volume I was already accessible in English, but only to those who could make use of the few great libraries of the country. It is here brought together in such a form and in such compass as to be accessible readily to anyone who wishes to familiarize himself with it. The first part is a collection of extracts from general literature which refer to ancient and primitive law and institutions, including the *Iliad*, the *Odyssey*, the biographies of Theseus, Romulus, Lycurgus, Numa Pompilius and Solon, from Plutarch's *Lives*; the accounts of Britain, of the Druids, and of the Germans, which are found in the *Commentaries* of Caesar; the *Germania* of Tacitus; and the *Njals Saga*. The second part is a collection of modern observations of retarded peoples, including studies of the native Australians, the Eskimos, the Seri and Wyandot Indians, and of the Kafir and Fanti laws. The third part is a collection of ancient and primitive laws and codes, including the Ancient Accadian Laws, the Code of Hammurabi, the Pentateuch, the Edict of Harmhab, the Laws of Gortyn, the Twelve Tables, the Laws of Manu, the *Lex Salica*, King Æthelbirht's *Dooms*, and the Laws of Howel Dda. The fourth part consists of a collection of Egyptian and Babylonian records of litigations, the Oration of Demosthenes against Aristocrates; the account of the Sacramental Action found in Gaius; Cicero's Oration in defense of Milo; German *Formulae Liturgicae* in use at Ordeals; and Egyptian, Babylonian and Assyrian legal documents, including wills and contracts.

Much of the material in the second volume was not translated into English before; much of it has been translated by the editors themselves, and, as in the case of the first volume, that part of the second volume which was available in English, could be read only by those who had access to the great libraries of the country. The introduction includes the *Evolution of Law* by Kohler; *Ethnological Jurisprudence* by Post; the *Imitation Theory* by Tarde, and the criticism thereof by Girard; and the *Science of Universal Comparative Law* by Del Vecchio. The subjects of Law and the State, Persons, Things and Procedure are discussed in extracts from De Coulanges, Kohler, Maine, Sohm,

Koehne, Somló, Wigmore, Leist, Collinet and Tarde; and many others of the great writers upon these subjects. We have here a wonderful selection, from widely scattered sources, of the most scholarly products of the acute intellects that have attempted to solve the great problem of the development of law. At the same time, valuable as the second volume is, it is the first volume that should be read if it were necessary to take one and to leave the other. Valuable as is the discussion of the existence in primitive society of a rigid and highly technical procedure tempered by frequent homicides whenever the procedure becomes so technical as to prevent an answer on the merits, or whenever the answer upon the merits is unsatisfactory to the party who seeks this method of review, it is better to read in the *Njals Saga*, how the suits for cold blooded murder were brought to naught because the prosecutors forgot to challenge 'six other men' so that three twelves and a half judged when three twelves only ought to have given judgment; and of the great battle at the *Althing* that followed. Valuable as are the discussions of the tendency of primitive law toward retaliation and penalties, it is better for us to learn these facts for ourselves from the *Code of Hammurabi*, the *Laws of Manu* and the *Assyrian contracts*. *Æthelbirht's Dooms* give us a table of payments to be made in compensation for injuries, more elaborate than the workmen's compensation act; and the *Code of Hammurabi* contains very thorough provisions regulating the maximum and the minimum wage. The treatment of impossibility of performance and of the effect of unforeseen difficulties and contingencies, which arise after a contract is made, upon its performance, is far more elastic, though less certain, in the *Code of Hammurabi* than it is in the law of the United States today. No abstract statement of such tendencies and peculiarities can take the place of a study, at first hand, of the sources of primitive law.

Those of us who believe that the case should be the primary basis of legal study, rather than the text book or the legal essay, will feel that the sources which are found in the first volume should be read and studied carefully, as the editors urge us to do, before the comment and discussion in the second volume is read; and if time suffices for but one volume, it should be the first. At the same time, it would be of the greatest value for us to check up our own ideas, theories and explanations by comparing them with the views of the great writers and teachers, from whose work are taken the extracts which are found in the second volume. Even a superficial reading of these two volumes will go far to dispel any lingering belief which any of us may have, that our common law theories are a part of the order of the universe; or even that a comparative study of common law and of Roman law can enable us to formulate a system which will answer the problems of life in the only possible way. On the contrary, we will see that while the problems which life has submitted to man for solution are essentially the same, and differ only in external forms, and that man, whether in the lowest depth of savagery or at the greatest development of civilization, is everywhere a being of substantially the same physical organiza-

tion, in much the same environment, and swayed everywhere by the same passions of hunger and love and fear and hate, the actual solutions of the problems of life which have actually been given are far more divergent than the most grotesque imagination could have anticipated. We can see in its actual operation the danger of assuming that an explanation of an existing legal institution which seems to us from our standpoint the rational one, must be the true one. We can see that the institutions and rules and theories which once fitted into the existing order of things, as the logical and inevitable deduction from the actual premises, may be left stranded by historical development, and may survive long after, in strict logic, they should have ceased to exist. We can see that great as is the danger of accepting an untrue but rational explanation, if given by one of our contemporaries, the danger is far greater when the rationalizing explanation was given centuries ago to explain an institution or a doctrine which had then long survived its sources for existence. Everyone who has made any study of the sources of primitive and ancient laws, or who has read any of the modern discussions upon the subject, will wish that greater emphasis had been put upon his own particular hobbies and upon his pet theories. No two, however, would probably agree upon any change which might be made. All who are interested in the study of law can realize the great need of such a work as this, and all can appreciate the admirable service which Professors Kocourek and Wigmore have done for the real advancement of the study of legal science. We await with interest and anticipation the appearance of the third volume.

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**SOME OLD SCOTS JUDGES.** By W. Forbes Gray. New York: E. P. Dutton, and Co., 1915. Pp. xii, 317.

"Some Old Scots Judges," is a collection of short biographies by the author, of twelve judges, who sat as "Lords of Session" or "Lords of Justiciary" in Scotland in the latter half of the Eighteenth Century and the earlier decades of the Nineteenth. The series consists of Lord Kames (1696-1782); Lord Monboddo (1714-1799); Lord Gardenstone (1721-1793); Lord Braxfield (1722-1799); Lord Hailes (1726-1792); Lord Eskgrove (1729(?) - 1804); Lord Balmuto (1742-1824); Lord Newton (1747-1811); Lord Hermand (1743(?) - 1827); Lord Eldin (1757-1832); Lord Jeffrey (1773-1850) and Lord Cockburn (1779-1854).

The author explains the object of the book in the following language:

"To present an adequate picture, by means of anecdotes and contemporary testimony, of the personalities of certain old Scots judges who are remembered more by their debt to adventitious circumstances than by their judicial eminence. The twelve senators here portrayed widely differed in intellectual and moral worth, but they had two things in common—they were all Scotsmen, and they were all men of marked individuality. To describe them merely as eminent lawyers would be to do them scant justice. They were lawyers, and a great deal more. They are interesting to the student of literature, of science, of art, and, above all, of human nature.

Moreover, the manifold activities in spheres remote from the law, of the earlier members of the group, their amazing eccentricities, and their still more amazing foibles are so completely at variance with the modern conception of those holding high judicial position, that one marvels how such men ever found their way to the bench. Certainly the judges here depicted cannot but arouse interest, though they may not always excite admiration.

"In the spirit of Pope's *dictum*, that 'the proper study of mankind is man,' I have essayed the task of elucidating the characters of these extraordinary men, most of whom sat on the judgment seat in the days when Scott was young. I have attempted, with what success the reader must judge, to show what manner of men those old Scots jurisconsults were—to present a conspectus of their philosophy of life. Accordingly, much space is devoted to setting forth their ideas and ideals, to recording their habits, their daily walk and conversation, their studies, their recreations, their manner of comporting themselves in the various relationships of life. In short, every effort has been made to shed as much light as possible upon their morals and their manners, their wit and their wisdom."

Further on the author says:

"I think it will be generally acknowledged, however, that the Scots judges who find a place in this volume were all men of commanding, in some cases of astounding, personality, and that their life and work will well repay study."

Whether their life and work "well repay study" is a question of point of view. It is doubtful whether the book is of any practical value either to lawyers or laymen. There is nothing in it giving any information to a lawyer which would be useful to him in the practice of his profession. Indeed, the author expressly states that this is not the object of the work, in the following language: "These pages are in no wise made to explicate or estimate judicial character from a legal standpoint." There is no recital in it of character or achievement which could be termed a source of inspiration to either lawyer or layman. For, after all, the value of a public man on the bench, or in other departments of government depends, not upon his social graces, nor his philosophical or historical research, nor his knowledge of the classics or literature generally, nor even upon his education, nor even, let it be said, upon his honesty—it depends upon his words and deeds in behalf of just and efficient government, of a larger, fuller liberty, above all, of the just and equitable distribution of the world's goods—in short, upon the degree that he contributes to the permanent happiness of the people whom he governs. Education, refinement, and tact undoubtedly aid the public servant with the will and ability to labor for a richer and freer life for the people of a nation or state, but there have been many men without the aforementioned qualities who have rendered lasting services in the cause of progress, and there have been many with those qualities who have hindered it. None of the men in the book contributed to human happiness or human liberty, with the exception of Cockburn, and, in a lesser way, Gardenstone and Monboddo. Of Cockburn, it is said:

"\* \* \* law reform was a subject which interested Cockburn deeply. By means of pamphlets, and articles in the *Edinburgh Review*, he strove incessantly to bring about improvements in the administration of justice in Scotland. In 1822 he published a pamphlet protesting against the now

long-abolished practice which permitted the judge in a criminal case to select the jurymen. Cockburn also urged the anomaly of the Lord Advocate's combination of the functions of an English Home Secretary with those of an English Attorney-General, a view which Parliament adopted some sixty years later."

He was also active in arousing public attention to the beauty of Edinburgh—"that fairest of all British cities and venerable as well as fair"—to the fact that the preservation of its charms was of great importance, even from a purely useful standpoint. But these were the only lasting services of even one, who is, perhaps, the most conspicuous of all the figures mentioned for temperateness and attainment. Lord Gardenstone founded a village upon his estate, "in which he caused a line of streets six furlongs in length to be formed"; he offered land on extremely favorable terms to induce people to settle in his village, and furnished the capital for starting various industries there. Gardenstone may also safely be claimed as the pioneer of the public library movement, at least in Scotland, founding the first of such institutions about the year 1765 in his village of Lawrencekirk and called by him The Public Library of Lawrencekirk. Monboddo was also instrumental, to some extent, in getting rid of the law's delay, by substituting "hearings" for "pleadings" in which circumlocution had become almost a fetish.

From the standpoint of a culture which is measured not by the practical usefulness of a person's knowledge but rather by his "study of mankind," the quaint and interesting information contained in *Some Old Scots Judges* is important to either a lawyer or layman and repays reading. The reader is let into the eccentricities of Eskgrove and Balmuto, the foibles of Monboddo, Gardenstone, and Eldin, the cruelty and prejudices of Braxfield, the great drinking capacity of Newton, and the even greater capacity in that respect of Hermand; and in contrast with the numerous stories and anecdotes on these matters, he may read others showing the wide and varied intellectual interests and the boundless intellectual and practical activity of Kames, the knowledge of Monboddo in the classics, the literary insight and capacity of Jeffrey, the charm, distinction and general ability of Cockburn. Moreover, Hailes might be a model of proper, high-grade mediocrity for any judge of the present day.

The information afforded by the book is too detailed and discursive to be adequately reviewed in the space allotted to the reviewer. It is, however, interesting to learn that Kames, though a busy judge, played an important part in the literary revival which occurred in Scotland in the middle of the Eighteenth Century, and that his work, "*Elements of Criticism*," running into three volumes, was regarded by Dugald Stewart as "the first serious attempt to set forth the metaphysical principles of the Fine Arts," while his "*Sketches of the History of Man*" foreshadowed truths of physical nature which have since been recognized, and contains the germs of doctrines of political economy which were afterwards put forth by Adam Smith in "*The Wealth of Nations*." And the life of Lord Jeffrey assumes special interest to the lawyer or layman inclined

to literary research, for Jeffrey was not only an able and temperate judge, but the first and greatest editor of the *Edinburgh Review*. He combined large literary and judicial labors, and not his least claim to fame will be that he was the critic of Byron's poetry, who was the subject of that poet's phillipic in poetry, called "English Bards and Scotch Reviewers."

Again, it may be important, from the cultural standpoint above noted, that Lord Hailes was not only a just and merciful judge, but a historian and pamphleteer who could successfully dispute on most abstruse historical and theological questions with the author of "The Decline and Fall of the Roman Empire," and that "probably no man of his time exploded more fallacies, brushed away more cobwebs of fictitious history, dealt more stinging blows at hoary tradition. He was a terror to evil-doers in the literary as well as in the criminal sense."

Important or not, in this busy, practical age, judges of the type of Jeffrey, Hailes, Cockburn, and Kames, men combining great judicial ability and industry with literary and cultural endowments, are practically extinct. The administration of the law today requires the business-like, specialist type of legal administrator. But it is also true that present conditions would not permit of such picturesque, unconventional, and often vicious figures as others of the judges described. Modern judges have their eccentricities and foibles, but they are of necessity diluted by the sobriety and conventionality imposed by a democracy. The drinking prowess of Newton and Hermand has been referred to, but a reader of a review, instead of the book, could hardly be prepared, by the example of the conduct of judges today, for this summary of the habits of Newton and Hermand:

"By a strange irony, his (Hermand's) reputation as a judge is overshadowed by his reputation as a toper. Newton and Hermand were great 'cronies,' and had many convivial meetings together, but Newton, as has been shown, was an able judge and an admirable lawyer, as well as a noted drinker. Hermand, on the other hand, did not sustain the dual reputation. Incredible though it may appear, he is remembered more by his bacchanalian performances than by his labors on the bench.

"Cockburn, who married one of Hermand's nieces, and had therefore good reasons for minimizing, if not screening his foibles, is even constrained to admit that this crazy judge 'acted in more of the severest scenes of old Scotch drinking than any man at last living.' What has been said of Lord Newton's predilection for card-playing might also with equal truth be said of Hermand's filial devotion to Bacchus: Drink was his profession, and the law only his amusement. To quote again his candid relative: 'Commonplace toppers think drinking a pleasure; but with Hermand it was a virtue.' In his view there was something wrong with the man who dared to set limits to his capacity for bacchanalian enjoyment. A person who could not, or would not, drink whole-heartedly, was a person to be shunned by all who were concerned about the maintenance of human fellowship."

Of Lord Eskgrove, the following appears:

"Cockburn has drawn an amusing picture of the ordeal which awaited the unfortunate juror summoned to attend his lordship's court. 'Often have I gone back to the court at midnight, and found Eskgrove, whom I had left mumbling hours before, still going on, with the smoky, unsnuffed



tallow candles in greasy tin candlesticks, and the poor despairing jury-men, most of the audience having retired or being asleep; the wagging of his lordship's nose and chin being the chief signs that he was still 'charging'."

The author begins his biography of Lord Braxfield in the following language:

"To Lord Braxfield belongs the unenviable reputation of being the most execrated judge in the annals of Scottish jurisprudence. Even Lord Advocate Mackenzie, whose cruelty to the Covenanters earned him the sobriquet of 'Bluidy Mackenzie,' was a scholar, poet, and, some say, a gentleman; but the most ardent apologist for Braxfield is compelled to admit that his good qualities are not easily discoverable."

The incidents related in the biography of Braxfield bear out this thesis of the biographer. He was tyrannical, cruel, coarse, and a bully. However, if he was the latter, he was certainly bullied in return. The following is a report of a scene in the trial of Maurice Margarot, a political prisoner, tried before Braxfield in 1794:

*"Margarot.* Now, my lord, comes a very delicate matter indeed. I mean to call upon my Lord Justice-Clerk; and I hope that the questions and the answers will be given in the most solemn manner. I have received a piece of information which I shall lay before the court in the course of my questions. First, my lord, are you on oath?

*Braxfield.* State your questions, and I will tell you whether I will answer them or not. If they are proper questions, I will answer them.

*Margarot.* Did you dine at Mr. Rothead's at Inverlieth in the course of last week?

*Braxfield.* And what have you to do with that, sir?

*Margarot.* Did any conversation take place with regard to my trial?

*Braxfield.* Go on, sir!

*Margarot.* Did you use these words: 'What should you think of giving him (Margarot) a hundred lashes together with Botany Bay,' or words to that effect?

*Braxfield.* Go on. Put your questions if you have any more.

*Margarot.* Did any person—did a lady say to you that the mob would not allow you to whip me? And, my lord, did you not say that the mob would be the better for losing a little blood? These are the questions, my lord, that I wish to put to you at present in the presence of the court. Deny them, or acknowledge them."

In another criminal case tried before him, John Clerk, afterwards Lord Eldin (not Lord Eldon, the English Chancellor) was counsel for the prisoner and the author relates what occurred, in the following language:

"With this young and brilliant advocate, Braxfield had several encounters. Clerk, it must be confessed, was rash and pugnacious, and just the type of man to ruffle the not too equable temper of the Lord Justice-Clerk. In the first encounter Clerk did not figure well. In language not very respectful, he charged the court with admitting improper evidence. He was, of course, reproved, but he persisted in impugning the judgment of the court, and in asserting that the jury were to judge of the law as well as the facts. 'Sir, I tell you,' exclaimed the infuriated Braxfield, 'that the jury have nothing to do with the law, but to take it simpliciter from me.' 'That I deny,' was Clerk's insolent answer. The court was indignant, but Clerk held his ground, and once more affirmed that the jurors were judges of the whole case. 'You are talking nonsense, sir,' roared Braxfield. 'My lord, you had better not snub me in this way,' was the instant reply, whereupon his lordship merely said, 'Proceed—gang on, sir.' There followed

more interruptions, and a tactful counsel would certainly have been more deferential, but Clerk never believed that discretion is the better part of valour. So he went on: 'Gentlemen of the jury, I was just saying to you, when this outbreak on the bench occurred, that you were the judges of the law and of the facts in this case.' *Braxfield*: 'We cannot tolerate this, sir. It is an indignity to this High Court—a very gross indignity, deserving of the severest reprobation.' But Clerk would either address the jury in his own way, or not speak at all. Whereupon the Lord Justice-Clerk called upon the counsel for the prisoner, Brodie, to proceed with his address; but the latter shook his head, as if declining to do so. The climax had now been reached. Braxfield was about to charge the jury when Clerk, starting to his feet, and raising a defiant fist to the bench, shouted, 'Hang my client if you daur, my lord, without hearing me in his defence!' These words produced a great sensation, and the judges immediately retired to hold a consultation. On returning to the court, the Lord Justice-Clerk requested Clerk to resume his speech, which he did without further interruption."

The opinion may be safely advanced that a judge on the bench today would severely punish such conduct either of prisoner or counsel. The most reasonable explanation for the passing over of such occurrences by Braxfield is their usualness. In passing, it is worthy of note that this advocate, Clerk, over a hundred years ago had a professional income for twenty years of not less than five thousand pounds a year. How many of the bar today can produce a professional income of twenty-five thousand dollars a year?

Mr. Gray does not make heroes of his characters, as have so many biographers, consciously or unconsciously. He has therefore succeeded in showing us just "what manner of men those old Scots jurisconsults were," as he set out to do. His style is lucid, unaffected, and leisurely. "Some Old Scots Judges" has a place in the library of the lawyer with plenty of money and leisure, or of the layman with antiquarian propensities.

Chicago.

ABRAM E. ADELMAN.

### ARTICLES IN PERIODICALS

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## THE CORRELATION OF WORK FOR HIGHER DEGREES IN GRADUATE SCHOOLS AND LAW SCHOOLS<sup>1</sup>

BY ERNST FREUND<sup>2</sup>

The relation of the study of law to other university studies has in the past been considered mainly from one aspect which has presented little difficulty. It is generally recognized that a lawyer is better prepared for his life work and is likely to obtain a broader view of legal principles if he brings to his profession some education in political economy, sociology, and political science. College courses in these fields are therefore recommended for pre-legal training, and are freely taken by students expecting to enter the law school. Work of this kind is chiefly undergraduate, and does not affect the relation of the law school to the graduate school.

In entering upon a discussion of the correlation of work for higher degrees in the law and graduate schools, it is first of all important to understand the conditions with reference to advanced work and the corresponding degrees found in American law schools at the present moment.

Recent advances in law school standards, either requiring a college degree as a prerequisite for a law degree or recognizing a previous college degree by the bestowal of a higher than the ordinary law degree have not changed the strictly vocational character of law school studies.

In 1902 when the law school of the University of Chicago was established, the thought that law work done by college graduates was deserving of the same recognition as other graduate work led to the introduction of the J. D. degree, which has since been

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1. A paper presented at the meeting of the Association of American Universities at Worcester, Mass., Nov. 11, 1916.

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adopted on the same basis by California, Leland Stanford, Jr., Michigan, and New York University. To some extent the appropriateness of the doctor's degree was also supported by the argument that the study of law on the basis of cases is a form of research; but in opposition to this contention it is insisted that it is not the mere use of original sources, but the independent discovery, collation, and sifting of source material which in the graduate school constitutes the title to the doctorate, and that the only corresponding work in law schools—brief writing for moot courts or practice courses, or note writing for law reviews—is of too limited a scope to be reckoned as the equivalent of a thesis. The bestowal of the doctor's degree in law upon the basis of purely vocational training (although to some extent supported by European precedents) has therefore met with a certain amount of criticism, and some of the foremost university law schools have refused to adopt it. In any event it must be recognized that the J. D. degree of this type and the Ph. D. degree represent work of such different character that it would serve little purpose to discuss the question of correlation. We may justly claim for the best law schools with purely vocational instruction a high and useful function well performed, but that function is not the stimulation or direction of independent research with the view to the advancement of knowledge.

It would be otherwise if the law school curriculum made provision and gave opportunity for serious investigative work on the part of students.

The preparation of a thesis figures as a matter of fact in the announcements of a few law schools as a part requirement for the regular degree, notably in California and Wisconsin, at one time also in Michigan. Nowhere, however, is this thesis required to be printed, nor does its position in relation to the entire course seem to rise very much above the level of a superior grade of term paper. It certainly does not correspond to the place of the doctor's thesis in graduate work. There is a prevailing conviction that the entire period of the three years' residence is needed to do even bare justice to the field of taught law that the law school offers. In other words, there is no present inclination to abate strictly professional in favor of research work, even if this policy should entail the relinquishment of the claim to the doctor's degree in law.

It is possible to save the integrity of the professional curriculum by offering opportunity for research work after the completion of the regular course. In a very informal way this has been done

in Pennsylvania since 1907. The law school announces, without any further specification, a graduate course for the writing of a thesis under the direction of the faculty, a single fee of \$100 being charged for a course of one or more scholastic years. Northwestern began to offer a fourth year in 1908, requiring a thesis upon some phase of local law worthy of publication in the *ILLINOIS LAW REVIEW*; Harvard introduced the fourth year in 1910, Michigan in 1915. Fourth-year work is also provided for in Columbia, Yale, and Boston, and New York University announces that it is prepared to offer it.

Pennsylvania, Northwestern, and Columbia recognize this work by a master's degree in law; Harvard by a doctor's degree; Michigan holds out the two degrees in the alternative. Neither Harvard nor Michigan requires a dissertation, and while the other schools demand a thesis or essay, only Pennsylvania and Northwestern seem to make provision for its being printed. It has been admitted in Columbia that the arrangement for the master's degree does not work satisfactorily, and the introduction of the doctor's degree has been strongly recommended by a committee of the faculty, though so far without success.

In order to judge of the possibilities of correlation, it is necessary to scrutinize somewhat closely the tendencies of the new graduate work in law. If its hope lay in the intensification of the work done in the professional school, i. e. in carrying to a more advanced stage the case work of the traditional type, we should expect a prominent place in the graduate course to be given to research in common law problems, with strong emphasis upon the production of a dissertation. But this is the case only in Pennsylvania and Northwestern, while, on the other hand, Harvard and Michigan have no thesis requirement at all, and nowhere do we find the mention of specific common law topics or subjects for graduate courses, although the common law offers abundant material for dogmatic research.

The subjects which dominate the fourth-year course are outside of the ordinary field of professional studies and relate to public and international law, legal history and foreign law, jurisprudence, and legislative problems. Among the courses announced we find the following: theory of law and legislation, province of written and unwritten law, problems of law reform; Roman law, civil law and modern codes; introduction to comparative law; procedural reform; penal legislation and administration; theory and practice

of legislation; problems of contemporary legislation; analytical jurisprudence; philosophy of law; and Anglo-American legal history. We need only place in juxtaposition a list of the usual law school courses: contracts; torts; trusts; wills; pleading; evidence; corporations; partnerships; suretyship; mortgages, insurance, etc., to realize that the usual order is reversed in law; it is the non-graduate work which is specialized and intensive, while many graduate courses are of the most general description, being apparently intended to introduce the student to phases of juristic thought and source material with which his professional studies have left him entirely unacquainted.

This character of graduate courses becomes especially striking when we compare it with the pronounced policy of law school instruction in favor of rigorous and intensive mental discipline, which has barred from most schools even an elementary introductory course, because it is believed that such a course would not be capable of severe and exacting treatment. While a relaxation of this policy in the case of advanced students only need not inspire serious apprehension, yet the majority of the new graduate courses seem to have been and to be still looked upon with some doubt and misgiving, and it was perhaps a consequence of this skeptical attitude that when the fourth-year course was introduced in Harvard, the dean's report failed to make any mention of the fact.

Analyzing the new graduate law work somewhat further, we may distinguish in it three main objects: first, the extension of the traditional type of work by including phases of public law not previously treated by a number of schools, particularly administrative and international law; second, a sort of higher criticism of the common law on the basis of historical and comparative jurisprudence, which may be supposed to be the ultimate aim of the courses in legal history and Roman law, and the direct aim of the courses in jurisprudence; and third, an entirely new attempt to take up constructive problems of legislation and law reform.

It is a noteworthy fact directly bearing upon the problem now under discussion that nearly the entire fourth-year law program had been anticipated in several universities by schools or departments of political science, and their experience with this work should not be neglected.

The fact that courses in jurisprudence and Roman law were given in the name of political science undoubtedly tended to discredit them with law students; to other than advanced law students

they were given at a considerable disadvantage, and intensive research work could be thought of in only very exceptional cases. The opinion has been expressed that a more intimate connection with the law school, and the bestowal of a law degree, will be necessary to produce satisfactory results with this kind of work. A greater measure of success in the fourth year of the law school may well be looked forward to; but for original work in legal history, the training, equipment, and special gifts of the historian are needed more than those of the lawyer or jurist; and the decline of the study of the Roman law in German universities since the introduction of the civil code does not seem to promise well for the future of that study, which seems destined to fall into the hands of classical scholars. As far as continental law is concerned, it would be strange if, with modern facilities for travel under normal conditions, a student desiring to take up the thorough study of some branch of French or German law should not prefer to pursue his studies abroad.

In view of these conditions it is doubtful whether the character of the instruction in this phase of fourth-year law work will be fundamentally different from what it has been in the past in departments of political science, although it may be expected to become more profitable if taken with a background of three years of common law.

In undertaking to teach public law, departments of political science were favored by the fact that there was a certain demand for such instruction in the law schools. As early as 1891 Columbia recognized public law courses for credit toward the law degree. Constitutional law was commonly treated as a regular law school course, but other public law subjects were first taught by men primarily connected with political science. International law still stands to a considerable extent outside of the law school, and Harvard Law School even now admits it only with the addition to the title "as administered by the courts," thus saving the law course from profanation. The subject of administrative law was developed in a school of political science, and that of municipal corporations was at least first taught there.

However, the more favorable the attitude of the law school was to these subjects, the more they tended to become pure law school subjects. This was due both to the fact that the law school furnished the larger and more responsive constituency, and to the necessity of founding all further work in public law upon a

thorough knowledge of its common law status; but incidentally the evolution of these courses testifies to the absorbing and overmastering interest of the judicial aspect of any branch of law that is administered by the courts. Either the political science side of the subject suffered by the emphasizing of the legal side, as in the case of administrative law, or the two sides became practically divorced as in the case of municipal government and municipal corporations. It was undoubtedly the subordinate place of the judicial side of international law which made it possible to maintain a fair balance between the law and political science of that subject.

While thus public law by being admitted into the regular law curriculum tends to be assimilated in character and method of treatment to other common law subjects, and problems of organization and constitutional relations fall to departments of government and political science, this division leaves no room for the constructive aspect of public law on its legal side. In this respect public law shares the fate of private law, the constructive problems of which likewise lack systematic treatment, while principles of criminal legislation become more and more the subject of scientific investigation.

When we speak of law reform, we have in mind all the inquiry and agitation that is directed to the more perfect realization of justice in its relation to legal rights and remedies. Problems of law reform can be effectually approached only upon a basis of thorough familiarity with the common law, and constitute a field of endeavor in which lawyers hold undisputed sway; it seems therefore to be believed that the ordinary professional training of the lawyer is an adequate preparation for their solution, and if legislation on legal subjects has in the past been often defective and disappointing this is apt to be ascribed to lack of competent professional advice.

The fact, however, is that principles of common law or equity furnish by no means adequate guidance to needed readjustments of legal relations, and that legislation has often had to do pioneer work without the aid of any preliminary scientific work.

Legislative thought has thus become a constructive factor in American jurisprudence which, however inferior to judicial thought in juristic scholarship and technique, cannot be safely ignored by legal science. Yet American law schools practically treat legislation (except as a subject of judicial interpretation) as a negligible quantity. And still less do they consider it their business to treat



systematically of the principles by which future legislation should be guided. This is a direct consequence of the exclusive devotion of law school instruction to the training of practitioners in court; legislative problems are not possible subjects of discussion in the court-room, and therefore not appropriate subjects of class-room discussion in the law school. The exclusively vocational character of the law school has thus been responsible for the serious neglect of an important aspect of legal science.

Under these circumstances the appearance in the graduate law curriculum of courses in legislation and law reform promises to be of special significance. This may not be fully realized even by those who offer them, for there has been so far little intimation of the precise scope and purpose of these courses. In some cases there is a special reference to procedural reform and criminal legislation, these being the subjects in which the greatest amount of systematic thought has been given to law reform and principles of legislation. It is reasonably certain that in course of time such problems as liability, the protection of purchasers and creditors, settled and community interests in property, form and informality in legal acts, or—in public law—discretion, compensation, penalties, methods of control, and methods of enforcement, will be scientifically studied with a view to discovering definite and demonstrable working principles of legislation, to be substituted for the prevailing fashion of reaching legislative decisions on controverted questions of legal policy on the basis of conjectural impressions and forecasts. Such a result may not be in all cases attainable, but in the mere adoption of new methods of inquiry and new standards of judgment there will be a gain.

Judicial decisions, instead of absolutely dominating legal thought, will be subjected to a more detached criticism, and may have to take their place as mere expressions of prevailing legal ideas and as factors in the production of social reactions which must furnish the ultimate standards of law. Legislative thought will count as no less legitimate a subject of study than judicial thought, and both the history of legislation and the history of its judicial interpretation, administration, and enforcement will serve to shift the emphasis in the consideration of legal rules from correctness and authoritative sanction of theory to the justice and effectiveness of their operation. It will be realized that courts must necessarily look upon canons of justice as static and imposed by authority, and that the monopoly of the judicial point of view in law schools and

law treatises unduly narrows the province of legal science. And by adding to the study and criticism of abstract concepts embodied in rules and principles, the observation and estimate of the living forces and tendencies which subject these concepts to the test of human experience and social reaction, legal science will assume a much closer relation to the other social sciences than it bears at the present time.

The limitation of the traditional aspect of law can indeed be best understood from the point of view of the social sciences. To them the law means the judicial administration and enforcement of existing arrangements, and represents the conservative forces which retard forward-looking legislative movements. It thus appears too much in the light of an inconvenient obstacle. It does not seem to be sufficiently realized that the preservation of the essentials of law is a social object second to none. Just as economic science has had to learn to look upon the social aspirations of labor not as antagonistic tendencies to be overcome, but as legitimate factors to be fitted into economic purposes, so all the social sciences must learn to look upon legal rights as a competing social interest with whose claims their own demands must be harmonized. The progress of the social sciences should naturally bring about this more sympathetic attitude toward law, but the complex mechanism of legal rights and remedies, the understanding and handling of which requires long and specialized training, practically debar others than lawyers from effective constructive work in this direction, and unless legal science assumes the development of this aspect of the law, it cannot be expected to be accomplished with any degree of success.

In the framing of specific legislative measures considerations of social, economic, and legal policy are practically so interwoven that satisfactory solutions depend upon intimate co-operation from the three points of view. It can hardly be otherwise than that this connection should express itself in the organization and conduct of university work. In the past, however, it has affected the social science departments more than the law school. The great organic legislation which in the last fifty years has revolutionized the entire relation of law to business, is discussed in political economy and not in law school courses. The signs point to a similar transformation of the relation of the state to all forms of organized social endeavor, and the university study of this legislation is likely to fall to sociology which has already in a number of institutions ap-

propriated the new science of criminology. It is true that it was an American law school which organized the American Institute of Criminal Law and Criminology, and law teachers have taken an active part in its work. But this co-operation has always been qualified by the reservation that law school instruction must not be affected by the new methods and points of view, and the law library has never been regarded as the appropriate repository for literature on problems of legislative policy and reform.

It may be expected that the wider scope of jurisprudence recognized in the new graduate law studies will alter this condition. In France and Germany, where jurisprudence has never lost entirely the constructive or non-judicial point of view, university instruction in law has always retained a closer contact with the social sciences than exists between law and other graduate studies in this country; the legal and political science faculty often forms one division of the university. The development in America is not likely to be controlled by European precedents, but if the more constructive study of law can establish itself in American law schools successfully, its correlation to other graduate studies may well be left to take care of itself.

The more difficult problem will be that of correlating the graduate courses in law to the professional law work. Will the former be able to assert themselves in competition with the latter? The energy that goes into advanced work must in a measure be diverted from professional instruction, and the inducements are nearly all the other way. Instruction in the better American law schools is in a satisfactory condition; it compares favorably not only with other university teaching, graduate or undergraduate, but also with the teaching of law in Europe. The now generally prevailing case method is effective and interesting to teacher and student alike, and is believed to be superior to any other method of teaching. The intelligent study of the common law is intellectually fascinating and exacting, and its immediate practical value is indisputable; no one could reasonably think of displacing the bulk of the present curriculum. The time of teachers is fully occupied with well-organized and well-attended courses, so that there is little waste in law school work. The newly introduced work necessarily involves a certain amount of experimentation, and its immediate results may now and then be disappointing. Its method will be not merely different from that of the teaching of the common law, but it will also be less easily handled for class-room purposes. The

material is inferior in quality and interest to case law, and much less readily available. The results that can be looked for will lack the precision and the authoritative sanction that make the study of the common law so satisfactory to the mind that demands certainty.

Under these circumstances it must be expected that professional teaching will continue to absorb the main energies of law teachers, and unless graduate work can be so organized that it will grow naturally out of the professional work, its future must be precarious. Even those who believe in the newly projected work prefer the large professional classes to the small number of graduate students for the greater stimulus and reaction that come from large numbers. Their effort will naturally be to gain for the new type of work a place in the professional curriculum, and this they will not accomplish unless they present courses of the practical value of which students will be convinced, and that can be taught by methods that can be made at least reasonably effective. Until they convince their colleagues of the success of their efforts, the common law will retain exclusive possession of the professional curriculum, and the graduate course will languish more or less as an exotic.

The entire problem then which we are discussing is a problem for the law school to take up and solve. The difficulties in the way of the indicated development should not be underestimated, but there are factors that seem decisive in favor of the new departure. It is unlikely that the great law schools which have committed themselves to the new work will abandon it without giving it a reasonable chance to prove its value and its possibilities. The growing demand for expert assistance in constructive legislative work will compel law schools to recognize the professional importance of that side of the law. The experience of the next ten years will show whether the new jurisprudence can be placed upon a firm and permanent basis and it will then be possible to discuss more profitably its relation to other graduate work.

# **A BRIEF REVIEW OF THE CRIMINAL CASES IN THE SUPREME COURT OF ILLINOIS FOR THE YEAR 1915-16**

BY WILLIAM G. HALE<sup>1</sup>

Within the year from March 1, 1915, to March 1, 1916, the Illinois Supreme Court handed down decisions in twenty-eight criminal cases. Of this number, sixteen were reversed, all but one being remanded, and twelve were affirmed. In the year 1912-13, thirty cases were decided, only ten being reversed, and twenty affirmed. In 1913-14, thirty-six criminal cases came before the Supreme Court, one-half of which were reversed and one-half affirmed. Last year thirty-five cases were decided. Of these twenty-one were reversed and fourteen affirmed.

It will be noted that the percentage of reversals is approximately the same as last year, and that both years have witnessed a marked increase in the percentage of reversals as compared with former years. It would be a difficult task, however, to draw any definite affirmative conclusions from these figures. It is perhaps easier to suggest what they do not show than what they do show; but even this is perhaps worth while in view of the fact that there is in this country a class of people whose morbid sense finds expression in magnifying the uselessness of everything that is, and which is easily carried by the ardor of its unbalanced mental dyspepsia far beyond the pale of legitimate conclusion from facts as they are. It may be pointed out then, first, that the figures do not indicate that the Supreme Court is looking with microscopic care for an opportunity to reverse the trial court and set the criminal (?) free. In fact, most of the reversals are based on quite obvious errors.

Nor do the figures indicate that the trial court is composed in any marked degree of the ignorant or unfit, or that our machinery for administering criminal justice is all wrong and therefore to be discarded. The best of workmen with the best of tools will sometimes make mistakes and this is especially true where the work is of necessity complicated and the time for the doing of it limited. Should we not, considering the fact that men are entirely fallible, take some satisfaction in the fact that approximately one-half of the work of our busy trial courts which is

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taken up for review, stands the test of higher criticism, and that as to the other half, there is provided machinery in our judicial system for seeing that mistakes are corrected, and that every man accused of crime shall have a fair, orderly, and impartial trial? Nor, of course, does it follow that reversal will set free the individual who is in fact guilty. A second trial, conducted along proper lines, may result in a conviction which will stand. Again, it may be noted that results that we would quarrel with on principles of justice are not always due to the courts, but quite as often to the legislature, and thus, in turn, to the people themselves.

It is obvious, of course, that a justified reversal of the lower court means that something was done which ought not to have been done, or that something was left undone which ought to have been done, in laying down or enforcing the law as it is. Too often, men ignorant of the law, inexperienced as practitioners, lacking in moral fiber, not thoroughly imbued with the impartiality of justice, men "not only with one, but even," as someone has said, "with two ears to the ground," are selected by our political system to administer the law. Too often police officials are seeking a victim and detectives a reward. Too often the state's attorney is imbued rather with a desire to win his case, to get a verdict while an excited populace is clamoring for revenge, than to see that the defendant has a fair and impartial trial, and this misguided ardor finds expression in the introduction of evidence which he knows or ought to know, is inadmissible, in the making of improper remarks in argument, and the wording of instructions too strongly against the accused. It may be suggested in passing, that alertness in the election of qualified officials, qualified both morally and intellectually, will serve in a measure to eliminate these prolific sources of error and reduce correspondingly the grounds for reversal.

Among the cases reversed the following raise questions of special interest: *People v. Hamilton*,<sup>2</sup> *People v. Kielczewski*,<sup>3</sup> *People v. Purcell*,<sup>4</sup> *People v. Israel*,<sup>5</sup> *People v. McKinney*,<sup>6</sup> and *People v. DeVore*.<sup>7</sup> In *People v. Hamilton* the defendant was charged with having committed rape on the eleven-year-old daughter of his employer. The child testified that the defendant, who slept in a room adjoining hers, came to her room at midnight, June 19th,

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2. 268 Ill. 390.

3. 269 Ill. 293.

4. 269 Ill. 467.

5. 269 Ill. 284.

6. 267 Ill. 454.

7. 271 Ill. 27.

and forcibly had intercourse with her, threatening to horsewhip her and burn the house if she told anyone. She also testified that the day following she told her small brother, seven years of age, what the defendant had done to her, but told no one else until July 6th, when she told her parents. The defendant was convicted and sentenced to eighteen years in the penitentiary. The court had no difficulty in finding the case fairly bristling with errors. It was error to permit proof that the child, in making complaint to her brother and to her parents, named the accused as her assailant. Proof of the fact of the complaint alone should have been received—all details of the complaint should have been excluded. "The only prohibitive force of such testimony," the court says, "is, that it is a circumstance tending to sustain the truth of the statement of the complaining witness (made on the stand) that an assault had been committed on her." This ruling is in strict accord with the rulings in earlier Illinois decisions. The Illinois rule is stated more in detail in *Stevens v. People*,<sup>8</sup> where it is said to be let in as an exception to the hearsay rule. In thus restricting testimony of this character to the fact of complaint, as distinguished from the details thereof, the Illinois court is following the weight of authority in this country, but is in opposition to the modern English doctrine: *The Queen v. Lilyman*.<sup>9</sup> Since the real purpose for which this testimony was receivable was to rebut the discrediting inference that might have arisen had the prosecutrix remained silent, it is obvious that the inquiry need not have gone beyond the fact of the complaint. Thus limited, its reception was not in violation of the rule which excludes hearsay, and was fully justified.

Other errors found in the *Hamilton* case were as follows. The father of the prosecutrix was permitted to testify that after the alleged rape, Hamilton, who boarded with the witness, would hang his head when he came to the table, and would look at no one, "as if there were something on his mind." It was error not to strike out the last clause. It is difficult to see, however, why this was not a proper use of language in describing the conduct of the defendant. It was prejudicial error for the trial judge to interrupt counsel for the defendant, who was keeping within the record in his argument, and to reprimand and criticise him, especially in view of the fact that the court later refused to sustain the defendant's objections to misstatements of evidence by the state's attorney with

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8. 158 Ill. (at p.) 120.

9. [1896] 2 Q. B. 167.

the remark that he wanted "that silly objection stopped." The case would seem to indicate some bias on the part of the trial judge and an enthusiasm on the part of the state's attorney for conviction that carried him off his feet.

The *Kielczewski* case<sup>10</sup> and the *Purcell* case<sup>11</sup> have been the subject of such learned comment in the ILLINOIS LAW REVIEW that any discussion of them now can be but little more than a repetition of what has already been ably said.<sup>12</sup> In the *Kielczewski* case the defendant and one Wasky were indicted for the robbery from the person of John Pyrecznski, of certain moneys, to-wit, the sum of thirty cents, and a pin of the value of fifteen cents. After testimony on both sides had been introduced, the court asked the attorney for the defense as to the ages of his clients. The attorney replied that he did not know; that they could answer for themselves. Upon being interrogated by the judge, the defendant Kielczewski answered that he was twenty-one; the other defendant, that he was twenty-two. The court, pursuant to the State Reformatory Act,<sup>13</sup> then submitted the question of age to the jury. The jury found both defendants guilty, and also that they were between the ages of ten and twenty-one years, and "about the age of twenty years." In view of this finding, the defendants were sentenced to the State Reformatory. The defendant, Kielczewski, appealed. The case was reversed and remanded for a new trial upon the ground that there was no evidence upon which the jury could base its finding that the defendant was under the age of twenty-one. In reaching this conclusion, the court lays down the rule, that the age of a person cannot be determined by inspection [alone], and, apparently, judging from the language used and the authorities relied upon, that facts gleaned from inspection cannot be treated in any case as evidence. The Supreme Court accepts as authority for this holding *Seaverns v. Lischinski*,<sup>14</sup> and *Wistrand v. People*.<sup>15</sup> The *Wistrand* case shows the rule of the Illinois court on this question with all its defects, and fully justifies the scathing criticism of the Illinois rule as drawn forth by the *Kielczewski* case from the pen of Professor Wigmore.<sup>16</sup> In *Wistrand v. People* (a case of statu-

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10. 269 Ill. 293.

11. 269 Ill. 467.

12. See note on the *Kielczewski* case by Professor John H. Wigmore, 10 ILL. LAW REV. 511, and by Professor Robert W. Millar, 10 ILL. LAW REV. 668; and on the *Purcell* case, by Professor Millar, 10 ILL. LAW REV. 596.

13. See 10.

14. 181 Ill. 358.

15. 213 Ill. 72.

16. 10 ILL. LAW REV. 511.



tory rape), the case of the state depended upon proof of three things, first, that the female was under the age of fourteen; second, that sexual intercourse occurred between the defendant and the girl; and third, that the defendant was over sixteen. It was held that the verdict of guilty must be set aside because there was no evidence to show that the defendant was over sixteen. The reasoning was briefly this—the confession of the accused, wholly voluntary, showed the defendant to be forty-four years of age, but the law says the *corpus delicti* cannot be proved by a confession alone, and the age of the defendant was a part of the *corpus delicti* in this case. “So far as proving his age was concerned,” says the court, “there was no evidence except his confession.” Counsel for the state was bold enough to suggest, however, that the inspection of the defendant by the jury, together with the confession, was sufficient to justify the jury in finding him to be more than sixteen years of age. To this the court answers, “The law does not allow the jury to fix age by inspecting his person.” The reason for this rule is stated as follows: “While the appearance of the defendant might be conclusive evidence to the jury, there would be some difficulty in having evidence of that character preserved in the bill of exceptions for the inspection of the court of review.” It will thus be observed that the Illinois court is not disposed to allow the inspection by the jury of a person whose age is in question to be treated as evidence in the slightest degree, and for the reason that the facts thus obtained by the jury cannot be made a part of the record for appeal. Indiana furnishes the chief support for this view.<sup>17</sup> The Illinois court need not have gone outside its own decisions for precedent that would sufficiently answer the argument that acts gleaned from an inspection should be excluded because they cannot be made a part of the record for purposes of review. Beginning with *P. A. & D. R. R. Co. v. Sawyer*<sup>18</sup> the Illinois court has repeatedly held, in eminent domain proceedings, that facts derived from a view of the premises by the jury are evidence. *Mitchell et al. v. The Illinois etc. Co.*,<sup>19</sup> *Green v. City of Chicago*,<sup>20</sup> the *Peoria etc. Ry. Co. v. Barnum*.<sup>21</sup> The Illinois court has thus not only been determined to run counter to sound principles previously announced in this state, but has placed itself in opposi-

17. *Stevenson v. State* (1867), 28 Ind. 272. But see *Bird v. State*, 104 Ind. 389, where the rule is regretted.

18. (1874) 71 Ill. 361.

19. 85 Ill. 566.

20. 97 Ill. 370.

21. 107 Ill. 160.

tion to the great weight of authority elsewhere. Probably the best refutation of the reasoning to which the Illinois court has committed itself is found in *Hart v. State*.<sup>22</sup> "Is it true, or is it a standard test, or even a test at all that the legality and admissibility of evidence depends upon the fact that it must be such as can and must be incorporated into and brought up with the record? We know of no such rule announced by any standard work on the law of evidence. If it be true, then the pointing out of a defendant in court is not legitimate or admissible, because he cannot be sent up with the record. A witness' countenance, tone or voice, mode and manner of expression, and general demeanor on the stand oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters and yet 'they cannot be sent up with record,' though they are fit subjects to be observed by the jury in connection with the testimony, and it is their duty to consider them in passing upon his testimony." It is clear that the matters here referred to are often controlling in their influence upon the decision of the jury, and yet the extent of such influence cannot be determined by the appellate court.

The Illinois rule as to proof of age is made still further ridiculous by the fact that it will permit a witness to take the stand and testify to age, even though his statement is based solely upon an inspection of the person whose age is in question. This rule is ostensibly safeguarded, however, by the requirement that the witness must describe the person's appearance, as far as possible. But how can a person adequately describe the data upon which his opinion as to age is based? Hence, how can the reviewing court know to any adequate extent the basis of such opinion, or how can the jury know how to estimate the value of such opinion? If, then, this is a matter which in our law is to be allowed to rest in opinion at all, would it not be better for the jury to observe the facts firsthand and form the opinion, rather than to accept the opinion of a single witness; and would it not be better from the standpoint of the reviewing court, charged simply with the duty in such matters of seeing that the verdict is not contrary to reason, that the verdict be based upon the opinion of twelve men, than the opinion of one man? The Oregon court has recognized the force of this argument to the fullest extent. In *State v. Robinson*<sup>23</sup> the defendant was indicted for statutory rape. It was necessary to prove that the

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22. 15 Tex. App. 202, 228.

23. 32 Ore. 43.

prosecutrix was under sixteen, and that the defendant was over sixteen years of age. On appeal, it was contended by the defendant that there was no evidence that the defendant was over sixteen, and further that the trial court was in error in refusing to let a witness give his opinion as to the age of the prosecutrix. The first objection the court held untenable on the ground that the defendant was "necessarily present in court and the jury were no doubt able to determine from his appearance that he was over the statutory age." As to the second point, the court concedes that the right to prove age by the opinion of a lay witness who has carefully described the appearance of an absent person is unquestioned, but holds that it was not error to exclude such evidence "where the person whose age is in controversy was present at the trial, as it would have been of no substantial aid to the jury," and further, because "the prosecutrix was present at the trial and testified at great length, and the jury were just as competent to form an opinion of her age from her size, appearance, and development as the witness."

Assuming that the court in the *Kielczewski* case was correct in holding that there was no evidence that the defendant was under twenty-one years of age, and therefore not rightly sentenced to the state reformatory, the case has been subjected to further criticism in holding that a new trial was necessary. Why, it is asked, could not the case have been properly disposed of by merely re-sentencing the defendant? This argument of the critic (Professor Millar<sup>24</sup>) is in brief as follows: *Sullivan v. People*,<sup>25</sup> in construing the Illinois Reformatory Act, has held that, "Unless proof is introduced to show that the defendant is under twenty-one years of age, the jury is not obliged to find his age in their verdict." In the *Kielczewski* case, when the appearance of the defendant is rejected, there remains no evidence that the defendant was under twenty-one, and the jury therefore was not obliged to find as to his age; an instruction by the court could not change this rule; hence the finding was merely surplusage and should be ignored. It follows then that the only error was in not sentencing the defendant in accordance with the material part of the verdict and the case might well have been disposed of by re-sentencing the defendant to the penitentiary. This criticism of the case seems entirely sound.

*People v. Purcell*<sup>26</sup> is another case raising an interesting ques-

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24. 10 ILL. LAW REV. 668.

25. 156 ILL. 94.

26. 269 ILL. 467.

tion and calling for special comment. The defendant was indicted for attempting to steal from the person. It was held that the judgment of conviction must be reversed, because the indictment failed to allege the value of the property which he had attempted to steal. The argument of the court is that the Criminal Code provides<sup>27</sup> that for an attempt to commit a felony (e. g., steal goods worth over \$15), punishment shall consist of imprisonment in the penitentiary, and in all other cases of fine or imprisonment in the county jail. Since the statute thus makes the punishment depend upon the value of the property attempted to be stolen, it is necessary for the indictment to indicate such value. In other words, the attempt to commit larceny is divided into two classes, corresponding to the two classes into which the crime of larceny is divided, viz., grand and petit larceny. And since in indicting for larceny the value of the property taken must be charged, so in indicting for an attempt to commit larceny, the value must be alleged. The court further concludes that, by reason of the wording of the Illinois statute, an attempt to pick an empty pocket is in this state no offense.

The chief criticism of the results here reached goes back of the court to the legislature. The legislative definition of attempt requires a distinction to be made between an attempt to steal property of a value in excess of fifteen dollars and an attempt to steal property of the value of fifteen dollars or less. And this in turn carries us back to the definition of larceny, in terms of property valuation, which is the root of the whole evil. As ably pointed out by Professor Millar,<sup>28</sup> "Any enlightened system of criminal law will distinguish between simple and aggravated theft, but the criteria by which a theft is deemed aggravated will never include that of value alone." No type of miscreant is more in need of punishment than the ubiquitous pickpocket, and his conviction should not depend upon the ability of the state to prove the value of what he was attempting to get. But in the absence of adequate statutory assistance, in revising either the definition of attempt or the definition of larceny, it is worth while to consider whether it was necessary for the court in the *Purcell* case to reach the conclusion that attempting to steal from an empty pocket is no crime in Illinois, even as the law stands. It is a crime generally elsewhere, and it should be here.

In view of the well-settled rule that a person indicted for grand

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27 Sec. 273.

larceny may be convicted of petit larceny if the proof offered fails to show that the goods taken were of a value in excess of a designated amount, why would it not be proper to indict a person who attempts to pick an empty pocket, for attempting to steal goods of any value that the prosecuting officer might be pleased to insert? It would be immaterial what value was alleged. There would then simply be a failure of proof as to value, i. e., a failure to prove that the goods were worth more than fifteen dollars. It would follow, of course, that there could be in such case no conviction of attempt to commit grand larceny. But suppose the jury should find the defendant guilty of an attempt to commit petit larceny. What objection could the defendant urge against such verdict? The evidence would show, as clearly as in any case in any of the jurisdictions where a person is now held liable for an attempt to steal from an empty pocket, that the defendant was attempting to steal some property which is the subject of larceny—hence property of some value. A finding therefore that he was attempting to steal property of at least nominal value could not be said to be unsustained by the evidence, and a verdict of guilty of an attempt to commit petit larceny must needs be upheld. The defendant would not be in a position to urge that he was not attempting to commit either grand or petit larceny. If he were convicted of the lesser of the two offenses, he surely could have no substantial, and it would seem, also, no technical grounds for complaint.

Contrary to the construction placed upon it by Professor Millar, a New York decision appears to justify this result. In *People v. Moran*<sup>29</sup> the evidence showed that the defendant thrust his hand into the pocket of a woman, withdrew it empty, and ran away. A policeman caught him, but could not then locate the woman. State's Attorney Jerome charged the defendant with attempting to commit grand larceny in the second degree, by "attempting to take and carry away from the person of an unknown woman, in the daytime, certain goods, chattels, and personal property of a kind and description unknown, and of the alleged value of ten dollars." The defendant asked for a directed verdict on the ground that the evidence did not sustain the charge. This was denied. A verdict of guilty was sustained. The case is in point in Illinois for the reason that in New York the crime of larceny is divided by statute into two classes, viz., grand larceny in the first and in the second degree. Grand larceny in the first degree is defined as consisting, among

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29. 123 N. Y. 254.

other things, of the taking of property valued at more than five hundred dollars, "in any way"; and grand larceny in the second degree is defined, in part, as the taking of property of any value from the person in the daytime, "under circumstances not amounting to grand larceny in the first degree." The former is made punishable by imprisonment in the penitentiary not to exceed ten years, and the latter not to exceed five years. It is further provided by statute in New York that the punishment for attempt shall be one-half that provided for the complete offense.<sup>30</sup> It would follow that the defendant's punishment in the *Moran* case would depend upon whether he was attempting to secure more than five hundred dollars or a smaller sum. It is noteworthy that the indictment was for the lesser offense, and that the conviction was sustained. The situation under the present Illinois statute thus seems similar to that under the New York statute, and hence the same method of procedure might well prevail here. This procedure would obviate the necessity of a present statutory change.

In *People v. Israel*<sup>31</sup> a question of procedure of some interest was raised. The defendant was indicted for knowingly receiving stolen property, it being alleged that part of the goods belonged to Cohen Bros. and part to Silverstein. The defendant objected that the indictment was bad for duplicity, since it appeared that the goods of two different people were received, and therefore two separate crimes were charged. It was held that the objection was unfounded; that one crime only was charged. The court refers to and criticises *Fruiland v. People*<sup>32</sup> for stating by way of dictum that "If a person steals a horse, saddle, and bridle, at the same time, by the same act, he may commit in law three several larcenies." The rule of the principal case is stated as follows, "Where the offense is one act, fully completed at the same time and place, it is but one crime, however many different kinds of property are stolen. There is no good reason why such an act may be said to constitute more than one crime because there are two or more separate owners of the property stolen."

The case was reversed, however, on the ground that the verdict was not supported by the evidence and for the further reason that the instructions given did not explicitly advise the jury that one accused of crime is presumed to be innocent until proved guilty.

30. *Birdeye, Cummings and Gilbert*, "Consolidated Law of New York," pp. 3970-71, sec. 1294; and p. 3786, sec. 261.

31. 269 Ill. 284.

32. 16 Ill. 380.

*People v. Krittenbrink*<sup>33</sup> was also a prosecution for knowingly receiving stolen property. It was alleged in the indictment that the property stolen was the property of Parke, Davis & Co., a corporation. The case was reversed on the ground that there was no competent proof that Parke, Davis & Co. was a corporation, and since ownership of the stolen property must be proved, the state's case must fail. The law is well settled that proof of ownership is an essential part of the state's case either on an indictment for stealing or for receiving stolen property. Why this ancient rule should be adhered to is not plain. At most it can only serve to help identify the property which may easily be otherwise sufficiently identified to advise the defendant of the acts charged against him, and to prevent prosecution again for the same offense. As to this case, it should be noted that a witness did testify that Parke, Davis & Co. was the owner, and that it was a corporation, but since no facts were testified to by the witness on which his opinion was based, the proof was held insufficient. Since it was really immaterial whether Parke, Davis & Co. was a corporation, a partnership, or a private individual doing business under that name, so far as the power to own property was concerned, and since the name testified to would sufficiently designate the owner for purposes of identification in case of another prosecution for the same offense, it would seem that the court might well have considered the proof of ownership sufficient for the purposes of this case, dispensing with more formal proof that it was one as distinguished from the other, since it does not appear that the defendant was misled. The proof offered is more definite, as a practical matter, than if it had been alleged and proved that the property belonged to John Smith.

*People v. DeVore*,<sup>34</sup> a prosecution for the uttering of a forged note, will be of interest to those who are seeking for material to bear out Judge Winslow's recent valuable article on "The Supreme Court and the Paper Mills,"<sup>35</sup> or Professor Warren's recent after-dinner address before the Illinois Bar Association, on "The Welter of Decisions."<sup>36</sup> The decision is thirty-eight pages in length—at least twenty-eight pages longer than there was any justification for. The result reached could have been as fully justified in probably one-fourth, and, at most, one-third of the space. In view of the rapidly developing mass of decisions, a campaign for shorter

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33. 269 Ill. 244.

34. 271 Ill. 27.

35. 10 ILL. LAW REV. 157.

36. 10 ILL. LAW REV. 472.

opinions is much needed. This would afford some relief from the growing burden of case law.

In *People v. McKinney*<sup>37</sup> the defendant McKinney, one Butler, and one La Fount were indicted for robbery. La Fount entered a plea of guilty and testified for the state. Butler and McKinney were tried and convicted. The case was reversed for numerous errors in the reception and exclusion of evidence. Among other things, the trial court refused to allow counsel for the defendant to cross-examine witness La Fount as to his expectation of receiving a light sentence or immunity of some kind in consideration of his turning state's evidence. This was most obviously an error. In view of the strictness of our law in excluding a confession from the defendant obtained by any offer of lighter sentence, the wonder is that the accomplice who turns state's evidence in response to such an offer is permitted to testify at all. It might seem logical to treat his testimony as so untrustworthy as to be rejected entirely. The very least that could be done would be to place before the jury the inducements leading him to testify as affecting the weight of his testimony. This should have been permitted in the principal case.

Of five murder cases before the Supreme Court three were reversed and two affirmed. Those reversed were *People v. Forte*,<sup>38</sup> *People v. Penman*,<sup>39</sup> and *People v. O'Gara*.<sup>40</sup> Those affirmed were *People v. Simpson*,<sup>41</sup> and *People v. Barnes*.<sup>42</sup> The *Forte* case presents the story of a jilted lover who returned to the home of his sweetheart seeking trouble, and there met his death at the hands of the girl's brother, Pasquale Forte. The deceased, Anthony Morasco, came to the Forte home early one morning, demanded money of the mother, and threatened to burn the house. The mother got a revolver and began to shoot at him. The daughter, Anna, shortly came out of the house with another revolver and shot once at him. Morasco immediately ran after Anna, knocked her down and began to beat her and pound her head against the wall. Cries of a younger brother to the effect that Morasco was killing Anna brought the defendant Pasquale Forte from the house armed with an axe, with which he immediately killed Morasco. Pasquale and Anna were both convicted of murder, Pasquale being sentenced to fourteen

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37. 267 Ill. 454.

38. 269 Ill. 505.

39. 271 Ill. 82.

40. 271 Ill. 138.

41. 270 Ill. 540.

42. 270 Ill. 574.



years in the penitentiary and Anna to the State Home of Female Offenders. The grounds for reversal were, first, insufficient evidence to sustain the verdict, and, second, erroneous instructions. There was no evidence that Anna took any part in the killing and Pasquale apparently acted under a reasonable apprehension that his sister was in danger of great bodily harm or death; and, if so, his act was justified. One of the instructions given was to the effect that one is not justified in killing except to save his own life, or to protect himself from great bodily harm. This instruction correctly states the law as to self-defense, but it was misleading in this case, since there was no evidence that Anna took any part in the killing, and it was not pretended that Pasquale's act was done to protect his own life. The jury may well have been misled, therefore, as to Pasquale Forte's justification, which under the law could be based upon an honest and reasonable belief that his act was necessary to save his sister from death or great bodily harm.

The *Penman* case<sup>43</sup> raised questions as to self-defense and insanity, and was reversed because of the giving of instructions which made no place for self-defense and insanity, and the improper exclusion of expert and other testimony. *People v. O'Gara* (*supra*), another case involving self-defense, was reversed because of failure to prove venue in Cook County.

In *People v. Barnes*, the defendant, a negro, was indicted for the murder of his mistress. He claimed that the killing was accidental, during a scuffle, provoked by the deceased. Reversal was sought on the grounds (1) that the verdict was unwarranted by the evidence, and (2) that the defendant was not properly represented by counsel at the trial. The court, in overruling the second exception, emphasized the fact that defendant chose his own attorney, and that the record did not show that he was incompetent. A tactical blunder would not show him incompetent, and further, it would be a dangerous precedent to reverse a case on such grounds.

Other cases reversed were as follows: *People v. Byson*.<sup>44</sup> Defendant was charged with horse-stealing. The trial court abused its discretion in refusing to allow a withdrawal of a plea of guilty, since it appears that the defendant was only eighteen years old, was not represented by counsel, was unfamiliar with the law and had been promised by a policeman that he would be sentenced and paroled.

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43. 271 Ill. 82.

44. 267 Ill. 498.

*People v. Rees*<sup>45</sup> was one of the famous Chicago insurance-fraud cases. The defendant was the owner of a stock of merchandise and was indicted, in conjunction with others, among them an insurance adjuster, for burning his stock with intent to defraud the insurance company. The case was reversed, among other reasons, because the court refused to instruct the jury that in determining the credibility of a witness, they should consider whether he had by hope of reward or immunity, or for other reasons, had his feelings enlisted against the defendant. It was also held that the contention that the evidence was insufficient to sustain the verdict was not well founded; and further, that there was no error in instructing the jury that the presumption of innocence is not intended for an aid to the guilty, but is a humane provision of the law intended to prevent an innocent person from being convicted. This instruction, the court says, would not induce the jury to refuse to give this accused the benefit of the presumption of innocence. Such presumptions as these are, in any event, relics of the days when punishments were out of proportion to the offense charged, when the person accused of crime was denied the right of counsel and the right to testify in his own behalf, and was all in all in a very different position than he is today, and hence should not now, in any event, be taken too seriously.

In *People v. Davis*<sup>46</sup> the defendant was indicted for embezzling \$500,000 worth of property belonging to his mother-in-law. The reversal was based primarily on the ground that the evidence was insufficient to sustain the verdict.

*People v. Weiner*<sup>47</sup> was a prosecution under the statute regulating the making, remaking and renovating of mattresses, quilts or bed comforters, and regulating the sale thereof. Reversed on the ground that Sections 1 and 2 of the act were unconstitutional, being class legislation.

*People v. Blumenberg et al.*<sup>48</sup> was an indictment for conspiracy to injury a certain business and extort money. Reversed because venue was not proved, and because of introduction of improper evidence.

The title and character of the cases affirmed will be briefly stated in order to complete the statistical matter contained in this review.

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45. 268 Ill. 585.

46. 269 Ill. 256.

47. 271 Ill. 74.

48. 271 Ill. 180.

*People v. Phipps.*<sup>49</sup> assault with intent to commit murder.

*People v. Yuskaukas.*<sup>50</sup> Mayhem. Defendant attacked his wife who had left him, and bit off part of her nose.

*People v. Strand.*<sup>51</sup> robbery. It was held that error was committed in refusing to let defendant prove that a witness for the state has made, at a preliminary hearing, statements contradictory of those testified to on the trial, but this error was not so prejudicial as to warrant a reversal, since the testimony as a whole was sufficiently clear and complete to sustain the conviction.

*People v. Rozanski.*<sup>52</sup> assault with intent to murder. The decision deals especially with the provisions of the Criminal Code respecting express and implied malice.

*People v. Butler.*<sup>53</sup> taking immoral, improper, and indecent liberties with a child. It was held that the statute<sup>54</sup> was not unconstitutional as providing a punishment out of proportion to the nature of the offense. If the minimum punishment provided is not plainly and flagrantly oppressive, the court will sustain the enactment.

*People v. Keyes.*<sup>55</sup> confidence game. The question raised was whether defendant was guilty of working a confidence game or of a mere breach of contract.

*People v. May et al.*<sup>56</sup> grand larceny from the person. It was held that the trial court was not in error in denying a motion for a change of venue, since the petition did not show that proper notice had been given.

*People v. Belt.*<sup>57</sup> indictment for embezzlement under the statute relating to the acceptance of deposits by a banker, with knowledge of the bank's insolvency. This case presents an interesting lesson in trial tactics. The state's attorney called various depositors to testify as to the amounts of money deposited by them, and to what extent they had not been repaid. The contention of the defendant was that the state should have proved the condition of the bank by the books of the bank, since the proof as offered tended to prove the defendant guilty of other crimes. It is quite obvious that

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49. 268 Ill. 210.

50. 268 Ill. 328.

51. 268 Ill. 542.

52. 268 Ill. 607.

53. 268 Ill. 635.

54. Ill. Rev. St., ch. 38, sec. 42.

55. 269 Ill. 173.

56. 269 Ill. 417.

57. 271 Ill. 342.

a line of depositors who had lost their all in the bank failure paraded before the jury would tend to arouse their feeling against the defendant. But this by-product of the evidence would not justify the exclusion of evidence otherwise proper, as this was to show the condition of the bank.

*People v. Hohimer*.<sup>58</sup> burglary.

*People v. Montgomery*.<sup>59</sup> selling cocaine without a prescription. The information charged that the sale was made to Pearl Williams. The purchaser testified that her name was C. Williams. The court reviews the evidence and finds that she was sometimes called Pearl and sometimes Clara, and that the jury were justified in concluding that the witness, Clara Williams, was generally known as Pearl, and hence that the verdict was not against the evidence.

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58. 271 Ill. 515.

59. 271 Ill. 580.

# THE ILLINOIS CRIMINAL DECISIONS FOR 1915-16: A COMMENT ON PROFESSOR HALE'S PAPER<sup>1</sup>

BY ROBERT W. MILLAR <sup>2</sup>

Most of us will readily concur in Professor Hale's view as to the impossibility of drawing any definite conclusions from the percentage of reversals during the past two years as compared with the two years preceding. Nevertheless, in the fact that in the year under survey it became necessary to set aside four-sevenths of the total number of convictions reviewed, we are confronted with anything but an inspiring picture. No doubt, the evils referred to by Professor Hale are in large measure responsible for erroneous rulings in the lower courts, but, on the other hand, a great share of the blame must be laid at the door of our system of criminal procedure. Some of the instances mentioned by Professor Hale speak eloquently in this regard. The failure to show the precise juristic character of the owner of stolen goods; the inadvertent omission to put the formulary question:—"And did this take place in the County of Cook and State of Illinois"; the necessity of proving value in order to convict of an attempt to steal from the person—have all contributed to the result before us. Awaiting the day when we can even approximate the simplicity of criminal procedure in England, a few well-directed sections added to our criminal code would appreciably diminish the number of reversals.

Turning to some of the cases commented on by Professor Hale, it is gratifying to note the consistency with which the Supreme Court has applied the rule involved in *People v. Hamilton*,<sup>3</sup>—namely, that it is error to permit evidence of the details of a complaint made by the complaining witness in a prosecution for rape: the fact of complaint is alone admissible. This is on the theory that the evidence is received not testimonially, but as corroborative of the complainant's testimony regarding the commission of the offense. How easy it is for courts to become confused in dealing with this subject is apparent from the cases marshalled in

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1. This comment is, in substance, the writer's discussion of Professor Hale's review at the 1915 meeting of the Illinois State Society of the American Institute of Criminal Law and Criminology.

2. Professor of Law in Northwestern University.

3. 268 Ill. 390.

Professor Wigmore's book on evidence. The soundness of the rule applied will be generally admitted. It is of course something of an anomaly that the question which must be put to the witness is one which in another field might be objected to as calling for a conclusion:—"Did you make a complaint?" As said by Mr. Justice Hawkins in the English case cited in the preceding paper—*Queen v. Lillyman*<sup>4</sup> "Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint?" But if the details are to be allowed in evidence, as under the English rule, then the jury must be carefully instructed not to regard them as testimonial evidence. Quite apart from the fact that this involves a degree of discrimination which scarcely could be looked for in all juries, an instruction of the kind would be quite likely to be of little effect as one of the mass of instructions which our system permits. Certainly, under our cumbersome practice in this regard, the rule as it stands is preferable to that followed by the English courts.

The case of *People v. Kielczewski*,<sup>5</sup> in holding that the defendant's appearance and demeanor on the stand are not evidence to support a finding as to his age, finds its sole justification in considerations of the record,—namely, that the appearance and demeanor are not before the court on appeal. But, in the light of the cases as to view in condemnation proceedings adduced by Professor Hale, even this ground disappears. In holding that, under the circumstances, the case could not be remanded for re-sentence, the decision is equally open to objection. Unquestionably the finding as to age was against the evidence, but if that evidence was unnecessary, there was no obstacle to rejecting the correspondingly unnecessary part of the verdict as surplusage.

With reference to *People v. Purcell*<sup>6</sup>—the pickpocket case,—I am, however, constrained to venture some slight dissent from what is said by Professor Hale. It is difficult to see how, under our statutes relating to larceny and attempt, the Supreme Court could have come to any different result. Professor Hale is of opinion that evidence of an attempt to steal from the person without proof that there was any property on the person would support a finding of nominal value. The objection to this is that it is importing a fiction into the verdict. Under the circumstances, the jury could quite as conscientiously find that the defendant was attempting to steal \$100 as that he was attempting to steal \$1. In either case, they are groping in the realm of the unknown.

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4. [1896] 2 Q. B. 167. 5. 269 Ill. 293. 6. 269 Ill. 467.

Nor can it be granted that, from this point of view, the New York case—*People v. Moran*—offers a way out. In spite of the added light which Professor Hale has brought to bear on that case, I still think that it falls within the category wherein no finding of value is necessary. The question, however, involves a difficulty in construing the New York statutes relating to larceny. As stated in the principal paper, a distinction is there taken between grand larceny in the first degree and grand larceny in the second degree. Grand larceny in the first degree is stealing (1) property of any value from the person in the night time; (2) property of the value of more than \$25 in the night time from a dwelling house, vessel or railroad car; and (3) property of the value of more than \$500 in any manner whatever.<sup>8</sup> Grand larceny in the second degree is stealing "under circumstances not amounting to grand larceny in the first degree" (1) property of a value between \$50<sup>9</sup> and \$500 in any manner whatever; (2) property of any value by taking the same from the person; (3) any record or writing, etc.<sup>10</sup>

Now, in Professor Hale's view, the words "property of any value from the person" mean property of less than \$500 in value, because of the preceding words, "under circumstances not amounting to grand larceny in the first degree." But, it may be asked whether the last-mentioned words do not more directly serve, in their relation to private stealing, to distinguish stealing from the person, generally, from the private stealing in the night time mentioned in the first subdivision of the section dealing with grand larceny in the first degree. Sound as Professor Hale's construction probably is, it is to be doubted whether it represents the view taken in New York. The only case I find bearing on the point is *People v. Frasier*.<sup>11</sup> That was a demurrer to an indictment charging that the defendant took and unlawfully appropriated the sum of \$2,000. The court said:

"If properly pleaded, the offense should be brought within subdivision 3 of Section 530 [the first degree section] as grand larceny in the first degree, in taking property of the value of \$500 in any manner whatever. Grand larceny in the second degree is defined as stealing or unlawfully obtaining property of any value by taking the same from the person of another. \* \* \* it must be held that the indictment does charge two offenses in a single count: First, grand larceny in the first degree; second, grand larceny in the second degree."

7. 123 N. Y. 254.

8. Sec. 1294 Penal Law, Cook's Criminal Code, 1915, p. 354.

9. This minimum was \$25 prior to 1912. Penal Code, 1881, § 531; Laws 1912, c. 164.

10. Sec. 1296 Penal Law, Cook's Criminal Code, 1915, p. 355; Laws 1912, c. 164. 11. 73 N. Y. Supp. 446.

Unmistakably, then, the court looks upon a charge of stealing \$2,000 from the person as a charge of grand larceny in the second degree. Hence it would seem to follow that private stealing of any amount may be prosecuted as grand larceny in the first degree, and if the indictment takes that form, proof and finding of value are of no consequence. The indictment in the *Moran case*, it is true, did contain the allegation that the property attempted to be stolen was of the value of \$10, but there is no indication in the opinion that the matter of value was regarded as of any importance or that the jury made any finding on the point. It seems, therefore, fair to conclude that despite the unsatisfactory wording of its statute, New York is better off than we are in the present respect, and that, as the case stands, no procedure could be adopted under our statutes which could dispense with an actual showing of value in order to support a conviction of the kind under discussion.

*People v. Krittenbrink*<sup>12</sup> is open to all the objections urged. Even under the rule requiring proof of ownership of stolen goods in a prosecution for larceny, the conviction might well have been affirmed on the evidence in the record. But this rule has long outlived any usefulness that it may have had, and should be got rid of. We might well profit by the example of the rules under the English Indictments Act of 1915, which provide that it shall not be necessary to name the owner except when required for the purpose of describing an offense depending on some special ownership of property.<sup>13</sup>

The same rules make us reflect upon another of our shortcomings when we read *People v. Butler*.<sup>14</sup> Five pages of that opinion are taken up in the discussion of whether or not the proviso in the statute creating the offense was a necessary part of the definition of the crime. Since the indictment had not negatived the exceptions in the proviso, it would have been held bad had the court decided that the proviso was descriptive of the offense. Interesting as such a question occasionally becomes, it has no place in the practicalities of criminal justice. In England, the axe has been here laid to the root. The provision applicable is that "it shall not be necessary, in any count charging a statutory offense, to negative any exception or exemption from or qualification to the operation of the statute creating the offense."<sup>15</sup> And it is hard to see how any real prejudice can be worked to the defendant by such a change.

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12. 269 Ill. 244. 13. Rule 6 (1). 14. 268 Ill. 635. 15. Rule 5 (2).



# PHILIPPINE LAW

BY GEORGE A. MALCOLM<sup>1</sup>

*Law as here used.* A title to this article technically correct, to which all would agree, is impossible. "Jurisprudence"<sup>2</sup> is discarded because, besides being unsettled in meaning it implies, to many in the Philippines, and elsewhere, merely case-law. "Law," while preferable, is a word of diversified signification to be found in many senses. The conception of the nature of law differs according to the views of the respective schools.<sup>3</sup>

"Law" as here used does not include organic law—the fundamental law, taking the place of a constitution, and usually studied in a course on constitutional law. Law as here used includes the whole system of rules of human conduct, subordinate to the organic

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1. Dean of the College of Law, University of the Philippines.

2. The Germans classify Science of Law (*Rechtswissenschaft*) into Jurisprudence, on one side, and Philosophy of Law, on the other. In this scheme, Jurisprudence embraces the concrete elements of law, while Philosophy of Law deals with its abstract and fundamental side. It is accordingly possible for German writers to consider Jurisprudence not strictly as a science of universal principles, but as something limited by time or place. They may therefore speak freely of a Jurisprudence of modern times, or the Jurisprudence of a particular state: (See *Sternberg*, "Allgemeine Rechtslehre," part First, pp. 123, 153; also, the diagram definitions of *Friedrich* "Die Bestrafung der Motive und die Motive der Bestrafung," 1910) in *Archiv für Rechts- und Wirtschaftsphilosophie*, Bd. III, 2, 201.) This is the usage of the European continent, and especially of France, where Jurisprudence is practically synonymous with case-law. It has also found a wide reception in our language: *Gareis*, "Science of Law," p. 22, note.

"The term Jurisprudence is wrongly applied to actual systems of law, or to current views of law, or to suggestions for its amendment, but is the name of a science. This science is a formal, or analytical, rather than a material one. It is the science of actual, or positive, law. It is wrongly divided into 'general' and 'particular,' or into 'philosophical' and 'historical.' It may therefore be defined provisionally as 'the formal science of positive law.'" *Holland*, "The Elements of Jurisprudence," 11th Ed., pp. 12, 13.

"Jurisprudencia Filipina" is the title of the Spanish edition of the Philippine Reports.

3. See *Holland's* "Jurisprudence," 11th Ed; *W. S. Pattee*, "The Essential Nature of Law" (1909); *Wilson*, "The State," Ch. XIV; *Karl Gareis*, "Science of Law" (1911); 25 Cyc. 163; *Black's*, Law Dictionary; *Wood's Appeal* (1874), 75 Pa. 59. There is no work in the language which in its popular and technical application takes a wider or more diversified signification than the word "law." *Miller v. Dunn* (1887), 72 Cal. 462, 466. "The Imperative School regards law as something commanded by the state (type: *Austin*). The Historical School contends that law is an unconscious development, like a language (type: *Savigny*). The Sociological School asserts that law is a complex of social evolution and social elements (type: *Post*). The Dogmatic School assumes that law proceeds from a higher authority than the state (type: *Augustine*). The Rational School finds the basis of law in reason (type: *Cicero*). The Metaphysical School discovers the immutable foundations of law in transcendental reality (type: *Kant*):—*Gareis*, p. 12, note.

law, of which the courts take cognizance. It covers both substantive and adjective law, both written and unwritten law, the subjects of all systems included in the usual classifications. Comprised within the term are codes, statutes, legislative resolutions, executive orders, court rules, ordinances, cases, customs, and treatises.

*Sources and Development.* At least four of the great legal systems of the world, canon, Mohammedan, civil (Spanish), and common (Anglo-American) have affected, and still do affect, Philippine law. Add to these, the native Malay customary law, the independent military law, and the far-removed currents which have carried legal knowledge to the Islands are discovered. The canon law, due to separation of church and state, is now looked to only in exceptional cases. The Mohammedan law following Islam into the southern Islands of the Philippines only concerns those of that faith. Customary law is more accepted practice outside the usual cognizance of the judiciary. And military law both under Spain and the United States was restricted to those of that branch. But the two other great streams of the law, the civil, the legacy of Rome to Spain coming from the west, and the common, the inheritance of the United States from Great Britain coming from the east, have here in the Philippines, met and blended.<sup>4</sup>

All these various sources of our law do but reflect Philippine history—custom—the inherent vitality of native institutions; canon and Mohammedan—the force of religious propaganda; military—the militant glory of the races; civil—the milestones of Spanish power; and common—the democratic progress of the United States.

The American constructive policy was determined by President McKinley when he recognized the force of the Spanish municipal law and when in his instructions to the commission he stated that

"The main body of laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure, and in the criminal laws to secure speedy and impartial trials, and, at the same time, effective administration, and respect for individual rights."

That these instructions have been followed is shown by the words of the United States Supreme Court in an opinion by Mr. Justice Day:

"Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the executive and

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4. See *R. W. Lee*, "The Civil Law and the Common Law—A World Survey," XIV Michigan Law Review, Dec., 1915, p. 89.

Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectively conserve and protect their rights."<sup>5</sup>

Generally, the foundation of the substantive law is the civil law, with the adjective law the replica of Anglo-American statutes.

How strategic a position this is for the Philippines! The concise, scientific precision and perfection of civil codification strengthened in its weakest parts by modern progressive procedural acts! Judge Abreu of the court of first instance has successfully established from legal history and juridical philosophy that this intermingling of legal systems is to the advantage of the peoples affected.<sup>6</sup> Rome and England, not to mention Quebec, Louisiana, and the Pacific states, all justify the admirable results of this policy.

"In each of these instances," Judge Abreu states, "the secret of success has invariably rested upon two facts: (a) that laws closely interlaced with religion, sentimental feelings, or family relations, were not superseded, and in case they were, it was in a slow and gradual manner; (b) that laws concerning relations not regulated before, or granting rights never enjoyed before, had been freely and promptly imposed. These two facts exactly repeat themselves, so far as I can observe, in the Americanization of the Philippine laws. In the necessary blending of the laws of the Filipinos with the laws of the Americans, it has happened: first, that when a law of their own was effaced by further legislation, the American law was better; second, that when the Filipinos had one too imperfect to suit present conditions, the law of the Americans was a necessity."

Our present endeavor should be to mould and develop a strictly Philippine legal system.

With these sources and this outline of development before us, we can classify Philippine law for our purposes into: (1) written, resolving into (a) Spanish, and (b) American elements; and (2) so-called unwritten, including the common law, case-law, and customary law. We can omit a description of canon law and military law as bound up with the other sources.

#### WRITTEN LAW—SPANISH.

*Force of Laws of Former Sovereignty.* History reveals many instances in which conquerors have permitted the laws of the new

5. *Perez v. Fernandez* (1906), 202 U. S. 80, 91, 50 L. Ed. 942.

6. *Jose C. Abreu*, "The Blending of the Anglo-American Law with the Spanish Civil Law in the Philippines," III Philippine Law Review, May, 1914, p. 285; also *Charles S. Lobingier*, "Blending Legal Systems in the Philippines," XXXII Review of Reviews, Sept., 1905, p. 336, and XXI Law Quarterly Review, Oct., 1905, p. 401; and *Jorge Bocobo*, "Civil Law under the American Flag," I Philippine Law Journal, January, 1915, p. 284.

territory to remain undisturbed. Lord Bryce says the reason is that

"Law is a tenacious plant, even harder to extirpate than language; and new rulers have generally had the sense to perceive that they had less to gain by substituting their own law for that which they found than they had to lose by irritating their new subjects."<sup>7</sup>

The French law left in Quebec, and the Spanish-French law continued in Louisiana are modern examples of the wisdom of this course.<sup>8</sup>

Numerous cases,<sup>9</sup> including some of Philippine origin, have settled the rules of the public law recognized by the United States which govern the effect of a change of sovereignty by conquest or cession upon the laws of the acquired territory. The primary distinction is between municipal and political law. "Municipal" is here used in its more extensive meaning in contra-distinction to international, as that law which regulates the intercourse and general conduct of individuals—laws intended for the protection of private rights.<sup>10</sup> "Political" is used to denominate the laws regulating the relations sustained by the inhabitants to the sovereign.<sup>11</sup>

The great body of the municipal laws of the acquired province or country remain in force until abrogated or changed by the government of the United States. For example, the inhabitants' rights of property are undisturbed.<sup>12</sup> Such municipal law of the former

7. "Selected Essays in Anglo-American Legal History," Vol. I, p. 593; see *Reinsch*, "Colonial Government," Ch. XVIII.

8. See *Exchange Bank v. The Queen* (1886), 11 App. Cas. 157; *Wagner v. Kenner*, (1842), 2 Rob. (La.) 120; C. F. Randolph, "Law and Policy of Annexation," p. 136; *Laurel*, "What Lessons may be derived by the Philippine Islands from the Legal History of Louisiana," II Philippine Law Journal, Sept., 1915, p. 91.

9. Sir William Scott in *The Fauna* (1804), 5 Robinson, 106; Marshall, C. J. in *American Insurance Co. v. Canter* (1828), 1 Pet. 511, 7 L. Ed. 242; Daniel, J., in *Leitensdorfer v. Webb* (1858), 20 How. 176, 15 L. Ed. 891; Fuller, C. J., in *Ortega v. Lara* (1906), 202 U. S. 339, 50 L. Ed. 1055, concerning an article of the Spanish Civil Code in effect in Porto Rico; Harlan, J., in *Alvarez v. U. S.* (1910), 216 U. S. 167, 54 L. Ed. 432, office purchased in Porto Rico not protected; Lurton, J., in *Vilas v. Manila* (1911), 220 U. S. 345, 55 L. Ed. 491, concerning the status of Manila; *Philippine Sugar Estates Development Co. v. U. S.* (1904), 39 Ct. Cl. 225; Trent, J., in *Roa v. Collector of Customs* (1912), 23 Phil. 315, 330. See also Lord Mansfield in *Campbell v. Hall*, Cowp. 204; the late Mr. Justice Brewer in his article on "International Law," 22 Cyc. 1729; *Moore*, "International Law Digest," I, pp. 304 et seq.; 5 Op. Atty. Gen. P. I. 510, 542.

10. Marshall, C. J., in *American Insurance Co. v. Canter* (1828), 1 Pet. 511, 7 L. Ed. 242; Field, J., in *Chicago, Rock Island, and Pacific Railway Co. v. McGlinn* (1885), 114 U. S. 542, 546, 29 L. Ed. 270; Bean, J., in *Cook v. Port of Portland* (1891), 13 L. R. A. 533.

11. *American Insurance Co. v. Canter* (1828), 1 Pet. 511, 7 L. Ed. 242; *Roa v. Collector of Customs* (1912), 23 Phil. 315.

12. Marshall, C. J., in *U. S. v. Percheman* (1833), 7 Pet. 51, 8 L. Ed. 604; *Strother v. Lucas* (1838), 12 Pet. 410, 9 L. Ed. 1137.

sovereignty as is inconsistent with the constitution and laws of the United States or the characteristics and institutions of republican government is at once displaced.

The previous political relations of the inhabitants of the ceded region are totally abrogated. The political law pertaining to the prerogatives of the former government necessarily ceases.

"It cannot be admitted that the king of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive, or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government and not according to those of the government ceding it."<sup>13</sup>

Such political laws of the prior sovereign as are not in conflict with the constitution or institutions of the United States continue in force only if the new sovereignty shall affirmatively so declare.<sup>14</sup>

The best presentation of the applicable rules is by Mr. Justice Field, in amplification of the previous statements of Sir William Scott, and of Chief Justice Marshall, as follows:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passed from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government, are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and to promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government they are altered or repealed."<sup>15</sup>

13. *Pollard's Lessee v. Hagan* (1845), 3 How. 212, 225, 11 L. Ed. 565, *e. g.* state religion; *U. S. v. Balcorta* (1913), 25 Phil. 273.

14. *Ely's Administrator v. U. S.* (1898), 171 U. S. 220, 43 L. Ed. 142; *Roa v. Collector of Customs* (1912), 23 Phil. 315, 330.

15. *Chicago, Rock Island and Pacific Railway Co. v. McGlinn* (1885), 114, U. S. 542, 546, 29 L. Ed. 270.

As a corollary to these principles, the fact that the transfer of territory from one nation to another brings in a new system of law makes no difference. So the civil law in all its mutations will be protected by the United States, a common law country.

"In the future growth of the nation," the United States Supreme Court once said, "as heretofore, it is not impossible that Congress shall see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the constitution to require them to abandon these, or to substitute for a system which represented the growth of generations of inhabitants a jurisprudence with which they had had no previous acquaintance or sympathy."<sup>16</sup>

The general rules heretofore described as to the continuation of laws of the acquired territory were followed for the Philippines by President McKinley in his instructions to General Merritt dated May 19, 1898, namely:

"Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property, and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force, and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion."<sup>17</sup>

The proclamation of General Merritt on August 14, 1898, on the capitulation of the Spanish forces was of similar tenor.<sup>18</sup>

*Application of Rules.*<sup>19</sup> In the application of the rules relative to the continuation of Spanish laws in the Philippines, the courts, as said by Mr. Justice Moreland, have taken this reasonable view: "The great body of our laws is of Spanish origin and comes to us

16. *Holden v. Hardy* (1898), 169 U. S. 366, 389, 42 L. Ed. 780; *Hubgh v. New Orleans Railway Co.* (1851), 6 La. Ann. 495, 54 Am. Dec. 565; *Chew v. Calvert* (1818), Walker's Reports (Miss.) 54.

17. Off. Gaz. Jan. 1, 1903, p. 1.

18. "The government established among you by the United States Army is a government of military occupation; and for the present it is ordered that the municipal laws, such as affect private rights of persons and property, regulate local institutions and provide for the punishment of crime, shall be considered as continuing in force, so far as compatible with the purposes of military government, and that they be administered through the ordinary tribunals substantially as before occupation; but by officials appointed by the government of occupation."

19. See, generally, *Charles S. Lobingier*, "The Spanish Law in the Philippines," 1 Philippine Law Review, March 15, 1912, p. 597, and Annual Bulletin No. 4, Comparative Law Bureau, July 1, 1914.

and is enforced by us upon the theory that it has survived."<sup>20</sup> The basic Spanish laws, the civil code, the code of commerce, the penal code, and the mortgage law are consequently construed as codes, as a matter of course. Only when the applicability of a particular article of one of these laws is in issue will the courts feel themselves bound to decide its validity.

A series of cases and opinions have resolved the further question of what other Spanish laws remained in force after American occupation.

The Supreme Court of the Philippines, affirmed on appeal to the United States Supreme Court, held that the law of waters in force in these Islands is the law of August 3, 1866, and not the law of 1879 of the Peninsula.<sup>21</sup> The provisions of the *ley provisional* were said to be in force in so far as they have not been repealed or amended by implication by the body of laws enacted in these Islands since the change from Spanish to American sovereignty.<sup>22</sup> The attorney-general found the penal provisions of the Spanish railway law of 1875 and 1877 as still effective; the Supreme Court also applied this portion of the law.<sup>23</sup> The attorney-general about the same time carried his ruling further in an opinion to the effect that the Spanish railway law of November 23, 1877, and the regulations for its execution of September 8, 1878, except as inconsistent with subsequent legislation embodied in Philippine statute law, or as repugnant to American institutions or the change from Spanish to American sovereignty, are in full force and effect in the Philippine Islands.<sup>24</sup> Articles 44 to 78 of the law of marriage of 1870 were extended to the Philippines, and with the portions of *las siete partidas* concerning divorce, continued in force.<sup>25</sup>

Whether the Spanish copyright law of January 10, 1879, had force after the change from Spanish to American sovereignty has never been definitely settled, although the weight of authority is in favor of the view that it was abrogated. This is the conclusion

20. Concurring opinion in *Forbes v. Chmoco Tiaco* (1910), 16 Phil. 534, 592.

21. *Ker & Co. v. Cauden* (1906), 6 Phil. 732, U. S. 268, 56 L. Ed. 432 (1912); also *Montano v. Insular Government* (1909), 12 Phil. 572. Described by *Carlos Tan*, "Water Rights in the Philippines," II Philippine Law Journal, Oct., Nov., 1915.

22. *U. S. v. Fortaleza* (1909), 12 Phil. 472, 477.

23. 3 Op. Atty. Gen. P. J., 395; 5 Op. Atty. Gen. P. L., 201; *U. S. v. Calaguas* (1909), 14 Phil. 739.

24. Op. Atty. Gen. P. L., Aug. 30, 1909.

25. *De la Rama v. De la Rama* (1903), 3 Phil. 34; *Ebreo v. Sichon* (1905), 4 Phil. 705; *Ibanez v. Ortiz* (1905), 5 Phil. 325; *Del Prado v. De la Fuente* (1914), 28 Phil. 23.

reached by two attorneys-general, a judge of the court of first instance of the city of Manila, a justice of the Supreme Court, a well-known text writer, and a member of the Manila bar in a monograph on the subjct.<sup>26</sup> Although the question was brought before the courts, on appeal, the Supreme Court permitted the case to go off on a question of jurisdiction.<sup>27</sup> The same doubt exists as to the Spanish mining law. Mr. Justice Willard expressed the opinion that it was not in force.<sup>28</sup>

On the other side, the Supreme Court found the Spanish military code no longer operative, presumably because a political law.<sup>29</sup> It decided the Spanish notarial act not to be in existence.<sup>30</sup> And it held in another case articles 17 to 27, inclusive, of the civil code, dealing with Spanish citizenship, to be political laws and so abrogated.<sup>31</sup>

Generally, therefore, the following are the Spanish laws which continued in practical operation after American occupation: civil code, code of commerce, penal code, mortgage law, *ley provisional*, marriage law of 1870, law of waters of 1866, and the railway law of 1877. Everyone was extensively modified by subsequent legislation. By persistent amendment the code of commerce, the mortgage law, and the law of waters became but skeleton codes,<sup>32</sup> and other laws as the *ley provisional* and the railway law were rarely used. By enactment of act 190, the Spanish code of civil procedure was nullified.<sup>33</sup>

#### WRITTEN LAW—AMERICAN-FILIPINO.

*General Orders of the Military Governors.* Two general orders of the military governors promulgated to cover omissions of the Spanish legal system were permanent contributions to the legislation of the Philippines.

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26. Attorney-General *Araneta*, 3 Op. Atty. Gen. 453; Acting attorney-general *Harvey*, 4 Op. Atty. Gen. 8; Judge Grossfield, *U. S. v. Yam Tung Way*, court of first instance, Manila, May, 1910; *Willard's* "Notes to the Spanish Civil Code," pp. 39, 40; *William Benjamin Hale*, "Copyright in Porto Rico and the Philippines," 11 Philippine Law Journal, January, 1916, p. 268; *Charles C. De Selms*, Unpublished Thesis. Likewise attorney-general of Porto Rico as to letters patent: vol. 1 Ops. 74, 181. But Attorney-General *Villamor* argued before the courts that the law was in force.

27. *U. S. v. Yam Tung Way* (1911), 21 Phil. 67.

28. "Notes to the Spanish Civil Code," p. 40.

29. *U. S. v. Sweet* (1901), 1 Phil. 18.

30. *Bagsa v. Nagramada* (1908), 11 Phil. 174.

31. *Roa v. Collector of Customs* (1912), 23 Phil. 315.

32. See *Espiritu*, "Notes on the Code of Commerce;" *Tan*, "Philippine Water Rights," 11 Philippine Law Journal, Nov., 1915, p. 192.

33. *Legaspi v. Aguilar* (1908), 12 Phil. 353.



"The powers of a military governor to issue orders, decrees, regulations, etc., which have the force of law in the territory over which he has jurisdiction is beyond question."<sup>34</sup>

General orders No. 58 of April 23, 1900, according to its preamble was issued "in the interest of justice, and to safeguard the civil liberties of the inhabitants of these Islands." The one hundred ten brief sections constitute a complete code of criminal procedure. This code secures to the accused all the rights to which he is usually entitled in the United States except trial by jury. It introduced the writ of habeas corpus. Mr. Chief Justice Arellano has said of general orders No. 58:

"This law, based upon the accusatory system, has abolished the inquisitorial process so derogatory of the rights of the accused, and which was the foundation of our former criminal procedure; the time formerly taken up by this inquisitorial system without the right of intervention on the part of the accused, which at times would be prolonged for years, dependent upon the difficulty of investigation, has been saved; the long period of preventive punishment suffered by so many persons during the long summary examination is now avoided, which said examination was carried on for the purpose of investigating the commission of a crime and whether any person was guilty thereof; the new procedure provides for a complete equality between the accuser and the accused between prosecution carried on by the Government and the defense of his personal liberty and security interposed by the defendant; a brief proceeding, which becomes and is public from its initiation, fully provides all that is necessary for a complete defense, and is an absolute safeguard of personal security; this undoubtedly, is the greatest benefit conferred upon the inhabitants of this country."<sup>35</sup>

The code of criminal procedure alluded to by the Supreme

34. *Duarte v. Dade* (1915), XIII O. G. 2006, 2009.

35. Report, Military Governor, 1900, App. A A, G G; *Le Roy*, "The Americans in the Philippines," vol. II, pp. 279, 280 (Note). General Crowder who helped draft the law summarizes the changes as follows: "(1) The requirement of a specific complaint or information, charging but one offense; (2) preliminary examination with witnesses, with immediate decision as to holding the prisoner, abolishing the interminable and secret *sumario*; (3) the right of being confronted by the witnesses, of cross-examination, of compulsory attendance of witnesses for defense, of exemption from testimony against one's self—all the methods of the open trial, in place of the secret or semi-secret procedure of the civil-law countries, and the right also of appeal in all cases; (4) the privilege of demurring to an insufficient complaint and of pleading a former judgment or jeopardy; (5) the right of the joint defendants to be tried separately; (6) the right of new trials in case of errors of law or newly discovered evidence; (7) the extension of such procedure, in a simple form, to justices' courts; (8) the making of all persons, including defendants, competent witnesses, instead of excluding the accused and his relatives and employees; (9) the evidence to be relevant and the best of which the case might be susceptible, doing away with the former free admission of hearsay evidence; (10) introducing the specific remedy of the habeas corpus writ, instead of the theoretical assurance in the Spanish law of a 'speedy trial'; (12) safeguarding the issuance and execution of search-warrants." *Le Roy*, Id.

Court as "the notably short, compact, and concise military order,"<sup>36</sup> has met the test of experience well. The legislature has had to amend or supplement it in but minor particulars. Prosecuting officials and members of the bar have all found it sufficient in practice. Former secretary of finance and justice Araneta says that

"This reform has met with general approval and applause, and is looked upon as one of the most positive benefits obtained from the Government established in these Islands."<sup>37</sup>

General orders No. 68 of December 18, 1899, as amended by general orders No. 70, series of 1900, is the other law issued by the military governor which should not be left unmentioned.<sup>38</sup> Liberty of marriage was there recognized. Civil marriage was regulated.

*Acts of the Philippine Commission.* For practically seven years—from September 1, 1900, to October 16, 1907—the Philippine Commission was the sole legislative body of the Islands. As during this period there was an American majority on the commission, and as these commissioners were simultaneously heads of executive departments, the laws enacted were consequently those which according to American minds were thought wise for the proper government of the Islands, and which usually were found necessary by reason of administrative experience. Naturally, therefore, American precedents were mainly taken and adapted to Insular conditions.

Exactly 1800 acts were enacted by the commission. About 100 of these were pushed through in the last month and a half preceding the inauguration of the Philippine Assembly. Many acts were private, special, temporary, or local in nature. All that were thought to constitute general and permanent legislation were printed in the "Compilation of the acts of the Philippine Commission." Here can be found laws of great importance which it would be wearisome to describe, but certain of which can at least be mentioned.

A subject which required close attention from the commission was local government. With this end in view the municipal code (act 82), the provincial government act (act 83), the Manila charter (act 183), the special provincial government act (act 1396), and

36. *U. S. v. De Gusman* (1915), XIII O. G. 1173, 1174.

37. "Organization of Police and Judiciary," *Cablenews-American Yearly Review* Number, 1911, p. 32.

38. See *Ramos*, "Marriage: Forms, Celebration, and Legal Consequence," p. 92.

the township government act (act 1397), were enacted after grave study and investigation. Later and still under its exclusive jurisdiction, the commission passed the Baguio charter (act 1963) and the organic act for the department of Mindanao and Sulu (act 2408). The earlier laws pertaining to local government, particularly the municipal code, were repeatedly amended. Of a similar strictly administrative character was the reorganization act (act 1407), the civil service law (finally revised as act 1698) and the election law (act 1582).

Fiscal matters received attention in the customs administrative act (act 355), the internal revenue law (act 1189 since revised) and the accounting act (act 1792 as revised). The professions—law, medicine, pharmacy, and dentistry—were regulated. Commercial development was encouraged and regulated by the mining law (act 624), the trade-mark law (act 666), the public land law (act 926), the friar land act (act 1120), and the forest act (act 1148). Health of individuals was protected in the pure food law (act 1655), and of animals in acts 1147 and 1760.

The subjects, of possibly the most interest concerning which the commission took action, are those which touch the judiciary and the Spanish codes, especially procedure. Act 136 provided for the organization of the courts. Various acts amplified the penal code. The corporation law (act 1459) and the chattel mortgage law (act 1508) vitally modified the Spanish substantive law. The Torrens system repealing much of the Spanish mortgage law was brought in by act 496, copied substantially from the Massachusetts law of 1898.<sup>39</sup>

The greatest contribution to the jurisprudence of the Islands was a code of civil procedure, enacted after full public discussion on August 7, 1901, as act 190. Governor Taft writing shortly after the code went in force said:

"The Spanish code of procedure was so full of technicalities as practically to deny justice to the litigant, and the Filipino bar were unanimous in a demand for a change. Judge Ide has drafted the code, and I believe that American lawyers who consult it will testify to the excellence of his work."<sup>40</sup>

The code follows closely the laws and codes of California, Ver-

39. See *City of Manila v. Lack* (1911), 19 Phil. 324; *Alba v. De la Cruz* (1910), 17 Phil. 49; *De Jesus v. City of Manila* (1914), XIII O. G. 130; *Enrique Altavas*, "Systems of Land Registration in the Philippines," III Philippine Law Review, Jan., 1914, p. 126.

40. *Wm. H. Taft*, "Civil Government in the Philippines," Outlook, May 31, 1902, p. 305, printed in his "The Philippines," p. 64.

mont, Georgia, Massachusetts, Mississippi, and Ohio.<sup>41</sup> "The California code," the Chief Justice has said, "is its true legal precedent."<sup>42</sup> Matters in the code which to the commission in its annual report for that year<sup>43</sup> seemed most important were the radical departure from the Spanish procedure; challenging of judges and other court officials is abrogated; civil liability of judges and justices of the peace for error in their judicial determination is done away with; and the sittings and proceedings of every court of justice are made public except when testimony is of an indecent character such as to require the exclusion of the public in the interest of morality.

*Acts of the Philippine Legislature.* In volume, the acts of the Philippine Legislature, constituted by the Philippine Assembly and the Philippine Commission, together with acts of the commission passed by it under its exclusive jurisdiction, have brought the number up to over 2,600. These fill nine bulky books of public laws.

The Philippine Assembly signalized its inauguration by the introduction and passage of the Gabaldón act, appropriating one million pesos for barrio schools. Interest in education was thereafter continuously manifested especially by an act (1870) authorizing a university of the Philippines. But it was natural that much of the work accomplished by the Philippine Commission should not be deemed satisfactory or should have become obsolete because of the passage of time. Accordingly we find various amendments of the election law, revision of prior laws as internal revenue (act 2329), judicial and health reorganization (acts 2347 and 2468), and an administrative code (act 2657). It was natural also that love for the native land should find expression in the passage of patriotic laws, such as one authorizing a pantheon of illustrious Filipinos (act 1856); another the purchase of the books of Rizal (act 2021); and still another approving a plan for a national capital (act 1841).

A creative tendency, which deserves special praise, and which was not ashamed to adopt legislation indorsed by such bodies as that on uniformity of laws, was shown. Thus there were established a bureau of labor (act 1868), a board of public utility commissioners (act 2307), a Philippine national library (act 2572), and a Philippine national bank (act 2612). Progress was indicated in the enactment of such modern laws as a bankruptcy and insolvency law (act 1956), the negotiable instruments law (act 2031), the

41. See the code of civil procedure as compiled, including citations to the known origin in the state codes of the various sections.

42. *Yangco v. Rhode* (1902), 1 Phil. 404, 410.

43. Report 1901, Vol. I, pp. 86-90. See further Public Session Minutes of the Philippine Commission, 1901, pp. 734 et seq., 861 et seq.

warehouse receipts law (act 2137), the irrigation law (act 2152), a motor vehicle law (act 2159), the registration and protection of patents (act 2235), the cadastral act (act 2259), a fiber inspection law (act 2380), the insurance act (act 2427), and the usury law (act 2655).

*Codification.* If the Spanish codes, the general orders of the military governors, and the acts of the Philippine Commission and Legislature were analyzed, Philippine law would be disclosed as in the following tumultuous condition: civil law, found principally in the civil code, the law of waters, the code of civil procedure, the mortgage law, the chattel mortgage law, general orders No. 68, and the irrigation law; commercial law in the code of commerce, the corporation law, the insolvency law, the negotiable instruments law, the warehouse receipts law, and the insurance act; criminal law in the penal code and the various penal acts of the Philippine Commission and Legislature; political law in a multitude of statutes including seven special local and provincial charters; and remedial law in the code of civil procedure, code of criminal procedure, *ley provisional*, and the land registration law.<sup>44</sup> The ancient mingled with the modern and substantive joined with adjective was the graphic but intolerable picture.

The wisdom of retaining much of the Spanish civil law and of engrafting only necessary additions was conceded. But in practice the result was that the courts and the bar have never been certain as to what the law is. Very seldom has the legislature expressly repealed inconsistent statutes. To ascertain in any particular instance whether there is an implied repeal is difficult enough, but to find whole chapters and titles affected, to be required to harmonize antagonistic systems, and not to be able to get court decisions at will was an impossible situation. One very able justice of the Supreme Court endeavored to indicate what portions of the Spanish civil code were still in force.<sup>45</sup> Another lawyer of long experience went through the civil code for the same purpose and accepted about half of the commentaries of the justice as correct. Each lawyer or judge was entitled to his own particular guess.

As temporary expedients, portions of the laws were compiled. As the compilation committee reported "the first step toward the final revision and codification of all the laws of the Philippine Islands"

44. In extenso outline in *Laurel*, "What Lessons may be derived by the Philippine Islands from the Legal History of Louisiana," II *Philippine Law Journal*, Sept., 1915, p. 63.

45. *Willard's* "Notes to the Spanish Civil Code."

was taken in the printing of the compilation of the acts of the Philippine Commission. Also the charter and revised ordinances of the city of Manila, the election law, the corporation law, the municipal code and the provincial government act, the public laws of the legislative council of the Moro province, the penal code, the code of civil procedure and other laws were compiled and annotated. Some of these were not official. All were at most, merely useful reference books. The need was, as in Louisiana, for conservative adaptation rather than hasty innovation. The need was, as in Porto Rico, for something more than compilation—for careful, permanent revision and codification.<sup>46</sup>

Act 1941 going into operation in 1909 and 1910 created:

"A code committee composed of a president and four members for the purpose of revising the civil, commercial, penal, and procedure codes which have been in force to date and the mortgage and land registration acts, and to prepare new codes upon said matters in accordance with modern principles of the science of law and with the customs of the country."<sup>47</sup>

The committee was also authorized:

"To revise, compile, and codify the existing general statutes of the Philippine Commission and Philippine Legislature, and to report the same so codified to the legislature for adoption as the revised statutes of the Philippine Islands."<sup>48</sup>

In somewhat bungling language the purpose appears to have been to have all Philippine law revised and codified in new codes.

The code committee in its work proceeded on the basis that there should be four codes: political code (later changed to administrative code), civil code, penal code (later changed to correctional code), and remedial code, to embrace all general laws, and a fifth book for special and local laws.<sup>49</sup> The plan of the committee provided that the administrative code was to contain the public laws, or the laws relating to governmental constituents, organization and administration, including public property, revenues, works, education, health and morals; the civil code, the private laws or the laws governing private persons, and their inter-relations, property, and obligations; the correctional code, the laws relating to crimes

46. For Porto Rico, see *Rowe* (a member of the Code Committee), "The United States and Porto Rico." For Louisiana, see *Wigmore*, "Louisiana: The Story of its Legal System," 1 *Southern Law Quarterly*, January, 1916, p. 1.

47. Code Committee described by *Pamatmat*, II *Philippine Law Journal*, Nov., 1915, p. 179.

48. Sec. 7.

49. Plan of Oct. 18, 1909. See *W. L. Goldsborough* (a member of the Code Committee), "Mechanics of Codification," XXV *Green Bag*, Dec., 1913, p. 496.

and punishments; the remedial code, the laws relating to relief, and to procedure in civil and criminal cases, including the law of evidence; and the special and local laws, the laws not included in the foregoing codes. The scheme has been adhered to quite generally.

The administrative code very properly takes the great mass of institutional acts and arranges them in a code. The code is divided into four grand divisions. Book I, treats of the organization, powers, and general administration of the Philippine government; included therein are the executive power, the legislative power and the judicial power, government service and employment in general, and taxation. Book II, concerns the organization and administration of bureaus; these are considered by departments. Book III, is entitled "government of provinces and other political divisions;" this covers provincial governments, municipalities, townships and settlements, chartered cities (the city of Manila and the city of Baguio), and the department of Mindanao and Sulu. Book IV is the "penal supplement."

The preparation of the civil code required mainly a careful joinder of acts of American origin with the Spanish civil code and the remnant of the Spanish commercial code in one scientifically arranged whole. The Philippine Commission in its report for 1901 said that "it is the intention of the commission, as soon as practicable, to make a complete revision" of the Spanish laws governing business transactions "into a single civil code, but without changing the fundamental principles of the civil law which here prevailed."<sup>50</sup>

A leading authority on the civil law quite similarly says that

"If the conflicting differences between the local and common law, peculiar to Spain and which have little force in \* \* \* the Philippines are eliminated from the Spanish civil code, and a few amendments in harmony with United States institutions are substituted for the provisions which relate to monarchical institutions, then would result, in the opinions of those familiar with the subject, a most excellent code suitable for the people of the Philippines."<sup>51</sup>

The plan of the code committee is concordantly to leave fundamentals unchanged. The civil code is divided into five books: book I, persons; book II, family rights; book III, property; book IV, successions; book V, obligations and contracts (including donations).

The need of a new code to take the place of the penal code with its harsh penalties, its recognition of monarchical forms, and

50. Report 1901, Vol. 1, p. 91.

51. Walton's "Civil Law in Spain and Spanish America," p. 112.

its unbending rules has long been recognized. A new criminal code was prepared as early as 1901 but was never acted upon. The correctional code prepared by the late Rafael del Pan shows, by its name, a purpose to advance with the science of criminology and penology. The author investigated widely all the leading penal systems of the world. His great idea was to present a code which would relegate into the past antiquated notions of revenge upon the criminal in order to provide a modern system of reform. The correctional code will stand as a monument to his erudition and progressiveness.

The remedial code continues the codes of criminal procedure and civil procedure, and numerous procedural acts with little change. The code of criminal procedure has never been found wanting. The code of civil procedure has been criticized as defective and as lacking in method and symmetry. Curing manifest defects, omitting duplications, but not disturbing established precedents was the intent in preparing the remedial code. It is divided into three parts: general matters, such as organization of the courts, jurisdiction, venue, attorneys-at-law and evidence; civil procedure; and criminal procedure.

At this time only the administrative code (act 2657), has been passed by the Philippine Legislature. It is thus too early to anticipate results. Is it too much to hope, however, that Philippine amalgamation will come out of the crucible of codification and legislation as flawless as the codes of our nearest prototypes—Porto Rico and Louisiana?

*Joint and Concurrent Resolutions.* Every session sees a number of joint and concurrent resolutions passed by the Philippine Legislature. The first action of the Philippine Legislature took the form of a joint resolution

"Conveying to the President of the United States and through him to Congress and the people of the United States the gratitude of the people of the Philippine Islands and the Philippine Assembly and their high appreciation of the privilege conceded to them of participating directly in the making of the laws which shall govern them."<sup>52</sup>

The general subjects covered in such resolutions have related to appointments of special committees, instructions to the resident commissioners, petitions to congress, validation of action, and adjournments.

As there are no constitutional restrictions relative to the form which Philippine statutes shall take, a resolution might here lay

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52. Printed in Volume 7, public laws, p. 337.



down a rule of conduct having the effect of law. Usually, however, as in other jurisdictions, a resolution proper would express merely an opinion or desire of the legislative body, or take that method by which to govern its own procedure.<sup>53</sup>

*Executive Orders, Proclamations, Rules, Regulations, and Circulars.* The European practice of confining a statute to a declaration of principles or policy and authorizing the development of details by "orders in council" or *decrets* of the executive is coming to be popular.<sup>54</sup> The Philippine Legislature has in various acts delegated the power to carry laws into effect to different executive officials. In other instances this authority has been assumed by heads of governmental offices under some inherent right which it is hard to place. Within the official sphere affected and often as affecting the public, such executive action is controlling, and may usually be considered as a law.<sup>55</sup>

Executive rules, Professor Willoughby observes, fell into two general classes:

"First, those established by an administrative superior and directed solely to the administrative inferior; secondly, those binding of course the administrative inferiors, but primarily directed to the private citizen, and fixing the manner in which the requirements of the statute are to be met by him. This second class of rules is, in turn, divisible into two classes; those to which a criminal penalty is attached for their violation, and those merely defining the manner in which rights created by the statute are to be enjoyed. The first of those two main classes of administrative ordinances differ from those of the second class in that though valid as between the administrative superior and his inferior, they do not create legal rights which the private citizen may enforce in the courts. \* \* \* As to those rules or ordinances, established by executive agents, providing the modes under which private persons may receive the privileges granted by law or be held responsible for violations of the duties imposed therein, it may in general be said that the executive may establish all special regulations that fall within the general field of the authority granted by law, and which are reasonably calculated to secure the execution of the legislative will as laid down in the statutes."<sup>56</sup>

Mr. Justice Moreland, considering executive order No. 41 of the insular collector of customs, found it to be of the first class because "it is nothing more or less than a command from a superior to an inferior." He further said:

53. Compare *Swann v. Buck* (1866), 40 Miss. 268, and *San Antonio v. Micklejohn* (1895), 89 Tex. 79.

54. See Barrows, "The Governor-General of the Philippines," XXI Am. Hist. Rev., Jan., 1916, pp. 306-308.

55. *Olsen & Co. v. Herstein* (1915), XIV O. G. 166; *Chun Toy v. Insular Collector of Customs* (1915), XIII O. G. 2206; *Villata v. Stanley* (1915), XIV O. G. 170.

56. Willoughby on the "Constitution," Vol. II, pp. 1325 et seq.

"It creates no relation except between the official who issues it and the official who receives it. Such orders, whether executive or departmental, have for their object simply the efficient and economical administration of the affairs of the department to which or in which they are issued in accordance with the law governing the subject-matter. They are administrative in their nature and do not pass beyond the limits of the department to which they are directed or in which they are published, and, therefore, create no rights in third persons. They are based on, and are the product of, a relationship in which power is their source and obedience their object. Disobedience to or deviation from such an order can be punished only by the power which issued it; and, if that power fails to administer the corrective, then the disobedience goes unpunished. In that relationship no third person or official may intervene, not even the courts. Such orders may be very temporary, they being subject to instant revocation or modification by the power which published them. Their very nature, as determined by the relationship which produced them, demonstrates clearly the impossibility of any other person enforcing them except the one who created them. An attempt on the part of the courts to enforce such orders would result not only in confusion but, substantially, in departmental anarchy also."<sup>57</sup>

The governor-general is expressly authorized by section 79 of the administrative code to make effective his "administrative acts and commands" by executive orders or proclamations. He annually issues over one hundred executive orders and numerous proclamations. In compass, they yearly make a fair-sized volume. Many are merely formal and ministerial in character. Some of the matters most frequently taking the form of executive orders or proclamations are reservations of public lands, confirmations of elections, calling special elections, promulgating laws or resolutions, publishing proclamations of the president, naming boards and committees, creating or transferring barrios and municipalities, and announcing holidays.

A great variety of orders, rules, regulations, and circulars are promulgated by the secretaries of departments and heads of bureaus. Of these there can be mentioned off-hand circulars of the executive secretary, the civil service rules prepared by the bureau of civil service and approved by the governor-general, the provincial division circulars of the bureau of audits, a constabulary manual, regulations and circulars of the bureau of health, animal regulations and orders of the bureau of agriculture, circulars of the bureau of internal revenue, rules of the board of public utility commissioners, land and forestry regulations, and customs rules, regulations, and circulars. The list is of course nowhere near inclusive, for there is practically no government office but which takes such action in some form.

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57. *Olsen & Co. v. Herstein* (1915), XIV O. G. 166.

*Rules of Court.*<sup>58</sup> The judiciary organization act provided that

"The judges of the Supreme Court shall make all necessary rules for orderly procedure in the Supreme Court and courts of first instance, and courts of justices of the peace, and for the admission of lawyers to the practice of the law before such courts, in accordance with the provisions of the code of civil procedure, which rules shall be uniform for all the courts of the same grade, and binding upon the several courts; but the judges of the Supreme Court may at any time alter or amend such rules."<sup>59</sup>

The code of civil procedure, in section 6, restates the same idea as follows:

"The judges of the Supreme Court shall prepare rules regulating the conduct of business in the Supreme Court and in the courts of first instance.

"The rules shall be uniform for all courts of first instance throughout the Islands. Such rules, when duly made and promulgated and not in conflict with the laws of the United States or of the Philippine Islands, shall be binding and must be observed, but no judgment shall be reversed by reason of a failure of the court to comply with such rules unless the substantial rights of a party have been impaired by such failure."

Chapter II of the code of civil procedure authorizes general or special rules to be formulated by the Supreme Court for the conduct of bar examinations.

By virtue of power having the force of organic law which could be added to but not taken away,<sup>60</sup> the Supreme Court promulgated "rules of the Supreme Court of the Philippines," "rules for the examination of candidates for admission to the practice of law," and "rules of the courts of first instance, Philippine Islands."<sup>61</sup> These rules, as the Supreme Court itself has said,

"Are few and simple." But "they are the laws of the court and must be obeyed until repealed, unless it can be shown that they are in conflict with the laws of the United States or of the Philippine Islands."<sup>62</sup>

Rules of court promulgated by authority of law, and not in conflict with law, have the effect of law.<sup>63</sup> Rules of court not put in force as provided by law or not in accord with the provisions of the statutes, or unreasonable or derogatory of legal rights, are of no force.<sup>64</sup>

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58. See generally 7 R. C. L. 1023 et seq.; 11 Cyc. 739 et seq.

59. Art. 136, sec. 28.

60. Philippine Bill, sec. 9; *In re Guardiania* (1913), 24 Phil. 37.

61. Rules printed in Volume VII Phil. Rep., pp. VII-XXI, later amended.

62. *Paterno v. City of Manila* (1910), 17 Phil. 26, citing cases.

63. *Inchausti v. De Leon* (1913), 24 Phil. 224, 226; 11 Cyc., 739 et seq.

64. *Song Fo v. Veloso* (1914), 26 Phil. 575, holding that the rule of practice which is alleged to be in force in the court of first instance of Manila whereby the clerk is directed to "place on the trial calendar all

*The Administrative Code of the Department of Mindanao and Sulu.* This is a compilation of the acts of the former legislative council of the Moro province, and of the executive orders, circulars, and regulations issued thereunder, revised and modified to conform to the organic act for the department of Mindanao and Sulu.<sup>65</sup> Further rules and regulations and instructions necessary to carry the code into effect are appended. The administrative council of the department, with the approval of the governor-general, amends the code from time to time.

The governor of the department of Mindanao and Sulu, with the approval of the administrative council, is also authorized to make and prescribe rules for the general welfare.<sup>66</sup>

*Provincial Resolutions.* Provincial boards issue resolutions or take action under another name having the same effect.<sup>67</sup>

*Municipal Ordinances and Resolutions.* All of the local governments, the city of Manila, the city of Baguio, and the Municipalities and townships are authorized by the legislature to enact ordinances and resolutions, although the more general term "regulation" is also used. The city of Manila compiles its ordinances as "the revised ordinances of the city of Manila."

Municipal ordinances are local laws prescribing a general and permanent rule.<sup>68</sup> Resolutions only differ in being of a special or temporary character ordinarily enacted with less formality.<sup>69</sup> Both ordinances and resolutions are as binding upon the people within the municipality, but not beyond it, as are the acts of the legislature within the Philippines.<sup>70</sup>

[To be continued.]

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causes pending and at issue" and that in such cases "notice of trial will be sent to attorneys or litigants, and failure to receive said notices will not be considered an excuse for non-appearance," has never been put in force under the provisions of section 6 of Act 190; is not of uniform application throughout this jurisdiction; and is in direct conflict with the practice followed in many of the courts throughout the Islands. See also 11 Cyc. 740.

65. Code authorized by act 2408, sec. 55; see also sec. 27 (j), act 2408, and sec. 2564, adm. code; these laws have the effect of continuing "existing legislation." Acts of legislative council enacted pursuant to act 787, sec. 12, 13.

66. Act 2408, sec. 8 (s).

67. Act 83, sec. 13, as amended; act 1396, sec. 17, as amended; act 2408, art. 11.

68. *Citizens Gas & Mining Co. v. Elwood* (1888), 114 Ind. 332; *Southern Pacific R. Co. v. Western Pac. R. Co.* (1906), 144 Fed. 160, 181; *Trinidad v. Sweeney* (1905), 4 Phil. 531.

69. *Blanchard v. Bissell* (1860), 11 Ohio St. 96; *Cape Girardeau v. Fougeu* (1888), 30 Mo. App. 551.

70. *New Orleans Waterworks v. New Orleans* (1896), 164 U. S. 471, 41 L. Ed. 518; 4 Op. Atty. Gen., P. I. 84.

# SHALL THE STANDARD LAW COURSE BE EXTENDED TO FOUR YEARS?<sup>1</sup>

BY PAUL L. MARTIN<sup>2</sup>

Von Jhering says in his "Struggle for Law:"

"The end of law is peace; the means to that end is war. \* \* \* The life of the law is a struggle—a struggle of nations, of state power, of classes, of individuals."

If it be true that the life of the law is a struggle, it is equally true that the life of legal education is a struggle. Hence, it is not strange that approved methods of preparing for the practice of law have run the gamut from the days of office study to the present period of law school supremacy. According to the United States Commissioner of Education, there were in 1870, 28 schools of law in the United States; in 1872, 42; in 1882, 48; in 1892, 63; in 1902, 102; in 1912, 124; and in 1914, 122. These figures sufficiently indicate the growth in the number of law schools in the United States, but do not tell the story of the struggle toward higher requirements as does an analysis of the figures for that period showing the length of course required in the various institutions. In 1872, four schools had a one-year course; twenty-eight, two years; one, three years; one, four years; and eight failed to report on the length of their course. In 1882 there were only two one-year schools; thirty-five schools required two years; five three years; two reported both one and two-year courses; and four schools failed to report. In 1892 there were five one-year schools; forty-three requiring two years; ten, three years; two reported one and two-year courses; and three failed to report. In 1902 there were five one-year courses; thirty-eight, two-year courses; fifty-one, three-year courses; two four-year night courses; one school reported one and three-year courses; three reported two and three-year courses; and two failed to report. In 1912 there was only one one-year course left, and only twenty two-year courses; ninety-two schools were requiring three years; six night schools required four years each; three schools reported three and four-year courses; one reported two and three-year courses; and one day school reported a four-year course.

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1. Dean of the Creighton College of Law, Omaha.

2. [In view of the developments referred to in an Editorial Note of this issue, it seems right to say that this article was written and accepted several months ago, and that limitations of space have prevented earlier publication.—Ed.]

It is evident from these figures that the rate of increase in the number of schools was greatest for the period extending from 1892 to 1902, being 61%, as compared with 31% for the preceding decade and 14%, for the decade preceding that—the rate of increase from 1902 to 1912 being 21%. These figures probably indicate that there will be no decided increase in the number of law schools for some years, particularly if we bear in mind that according to the last report of the United States Commissioner of Education there are only one hundred medical schools of all classes in the country; fifty schools of dentistry; and seventy-two of pharmacy. Moreover, these figures show that within the decade of 1902 to 1912 the three-year law course has become standard, the one and two-year schools clearly being doomed to disappearance. The struggle of the schools to raise their standard not only for admission, but also for graduation is apparently being felt and it is probably safe to say that the next decade is to witness the total disappearance of the one and two-year schools, the raising of the requirements of the three-year schools both for entrance and graduation, and a decided improvement in the equipment and in the teaching methods of the schools generally.

It may not be amiss to consider whether the tendency toward lengthening the law course, so evident from the figures given above, is not destined to carry us, in the not far distant future, to the four-year standard course. Before considering the matter on its merits, it may be interesting to note that the standard medical course has moved up from three to four years, and that, commencing in 1917, the standard dental course is to move on from three to four years. Standard medical schools have not only been requiring four years for some time, but many of them are now talking about, and some are now requiring, a fifth year devoted exclusively to practical work in a hospital. Then, too, the longer period of study generally required by the foreign law schools is at least worth considering.

It is undoubtedly true that the law school teaches substantive law better than the office could, but the practitioner has until recent years enjoyed a virtual monopoly in the practical teaching of adjective law. It is true that the schools have been offering courses on evidence and pleading, but until recently little attempt has been made to teach the application of adjective law, which is generally called practice. Now, however, the schools are taking a gradually growing interest in teaching not only the theory of both substantive and adjective law, but also the practical application of the law to particular cases through elaborate courses in practice,

through Moot Courts, Legal Aid Societies and various other means.

The common objection urged against the attempt to teach the practical application of the law has been that a three-year course does not provide time enough for proper instruction in both the theory and practice. Then, too, it has been said that a man who is properly grounded in the theory will learn the practice for himself after graduation, and sometimes it is suggested that the schools, regardless of the time at their disposal, cannot compete with the office in the teaching of practice.

The answer to the first objection seems to be emphatically in favor of a fourth year, thus giving the schools ample time to supplement the training of the first three years in theory with a year of practical application. The answer to the second objection, namely, that if a man is properly grounded in the theory he will learn the practice, is that the schools presumably exist to prepare men for the bar and not for an apprenticeship in an office. They have practically superseded the office as a place for legal instruction and they should carry the whole burden. No medical educator suggests that medical students should be graduated after three years' study and then turned loose upon the public to learn how to practice at the expense of their patients. The standard medical course covers two years of what might be called theoretical work and devotes the last two years to practical training in the dispensary, the out-patient clinic and in the hospital. Law schools should try to do as much for their students as the medical schools are now doing for the young doctors.

The answer to the third objection, namely, that the school cannot compete with the office as a place to study practice is not sound. It is true that some states require an apprenticeship in law after the completion of a law school course, but in most communities it would be idle to suggest that the law office is a better place to learn practice than is the law school. The same organization which has enabled the law schools to supplant the office in the teaching of the theory of law ought not to break down under the task of teaching practice. Of course, no one thinks that any school can discount the value of experience, and it will always be true that the most marked success at the bar will be apt to crown the efforts of him who has long been accustomed to meet the battles of the practitioner; but the law office with its emphasis on the care of its clients' interests, with its likelihood of specialized or restricted practice, with its staff recruited from the view-point of each individual's ability to insure the success of the office rather

than because of his ability to teach, is not, taken in the large, a desirable substitute for the properly organized law school as a place in which to teach practice.

Some one may object that only he who practices can teach practice. This argument may be sound, but there is no reason why the schools cannot, by a careful selection of their staff, procure as teachers of practice, men who have shown their capacity for this work and who, moreover, have the qualities that go to make successful teachers. There is no gainsaying the fact that the successful practitioner, whose professional interests are sufficiently varied, may be a most competent teacher of practice, and, if he has the leisure and inclination, may do a great deal for the young man, or possibly for two or three young men, who are privileged to come into close personal contact with him in the daily conduct of his work, but obviously it would be a hopeless task to try to find enough of such men in this day and age to accommodate the graduates of the law schools of the country each year. The only alternative therefore, is the law school—its courses on practice being in charge of a practitioner fitted for the work—but this additional burden cannot be sustained by the schools in the present three-year course, and the addition of another year will therefore ultimately be necessary.

As was said by ex-President Meldrim of the American Bar Association in his annual address before that body in 1915:

"Law is made for society and must meet its actual needs. When it fails to do so, respect for it is lost, and its power for good is destroyed. 'The law of a nation,' says Mr. Bryce, 'is not only the expression of its character, but a main factor in its greatness.' The true measure of a people's greatness is their respect for the law."

No one need be told that law and lawyers are now, as ever, deemed the legitimate object of public and private attack—their motives being constantly misconstrued, their methods ridiculed and their profession condemned. The millenium is a long way off and law and lawyers must always expect to be criticised, but there is no doubting the fact that both the cult and its votaries would deserve and gain a much higher respect were lawyers more efficient in the discharge of their onerous duties.

Efficiency presupposes training as well as talent and application. The schools have no control over talent or opportunity, but they may do much for proficiency and until they assume the burden, rightfully theirs, of training men not only in the theory of law but of actually preparing them for practice, as do the schools of medicine, of dentistry, of engineering, etc., legal educators will



not have discharged their whole duty to society and will not have done their utmost to make the administration of the law deserve that popular approval which, as Mr. Meldrim says, is "the true measure of a people's greatness." If this duty of the legal educator cannot be discharged except by adding another year to the standard law course, then let us by all means have this additional year and have it soon.

## SOME DIFFICULTIES UNDER THE ILLINOIS TOWNSHIP HARD ROAD LAW

By J. ED THOMAS<sup>1</sup>

The hard road law as revised in 1913 and amended in 1915 presents several problems that have not been directly passed upon by the Supreme Court. The enthusiastic movement for better roads in Illinois is sure to bring some parts of this law into question within the next few years. It is well enough therefore to consider these problems and at least avoid as many mistakes as possible. During the past year there have been a number of progressive townships that have held elections providing for the issuance of bonds to construct permanent hard roads. This year will see many more such elections and bond issues. The validity of some of these are bound to be tested in the courts.

Under the Road and Bridge Law<sup>2</sup> there are two means of raising money in townships for the construction of hard roads, namely, by special tax and by borrowing money. Previous to the 1913 revision the special tax of one dollar on each one hundred dollars of the assessed valuation had to be exhausted before money could be borrowed on a bond issue. The present law has changed this so that a bond issue can be voted in the first instance, if desired; or both the bond issue and special tax can be voted to run concurrently.<sup>3</sup> This gives a greater latitude than under the former law.

The petitions to call for a vote under these two provisions differ materially. The petition for the special tax requires the signatures of twenty-five per cent of the land owners who are legal voters of any township, and it shall also state the location and route of the proposed road or roads to be improved. While the petition for borrowing money shall be signed by the commissioners of highways in their official capacity and one hundred freeholders, or, if there are less than two hundred freeholders, then by a majority of them, but it is not necessary to describe the roads to be improved with the money borrowed. These can be located afterwards by the commissioners of highways.

In small townships the required signatures to the petition for the special tax could be easily secured, but in the more populous ones it would be quite a task. On the other hand, the petition for

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1. Of the Illinois Bar.

2. Article 6, Subdivision 8.

3. *The People v. C. L. & C. Ry. Co.*, 247 Ill. 446, p. 450.

borrowing money would not be a difficult undertaking in larger townships. Besides, the bond issue is the more preferable manner of procedure since it secures all of the money desired for immediate use, while the special tax cannot be used until collected. Therefore, the bond issue provision will be most frequently used by townships wishing to construct a system of paved roads.

The forms of the ballot provided for under both provisions are similar. The only objection that has been raised to the form of the ballot is that the proposition to be voted on is stated in the affirmative and a "yes" and "no" vote required thereon. That this form of ballot does not give a fair opportunity for the voter who opposes it to vote against it has been urged as the reason for the objection. To the layman this does not appear as well founded; for he considers a "yes" as being in favor of the tax or bond issue, and a "no" as being against it. There is no doubt as to the intention of the voter who marks such ballot; and it is evident that the legislature in passing the law meant that the ballot should be so interpreted. The idea that the ballot states only one side of the question voted on arises from the fact that under the act of 1883 the form of the ballot was prescribed, "for special tax, etc." and "against special tax, etc."; "for borrowing money, etc." and "against borrowing money, etc." Under the present form of ballot the designation of "yes" and "no" does away with the statement of the proposition in both the affirmative and the negative.

The manner of holding an election on these propositions presents this anomaly that the vote is taken at the "annual town meeting" or at a "special election." From this much confusion may arise, for a town meeting is something entirely distinct from a town election, and is governed by entirely different provisions. Many townships have more than one voting precinct at the annual town election, while the annual town meeting is held at one place known as the town hall, where the voters of the entire township must vote; for "each town shall, for the purpose of town meetings, constitute an election precinct."<sup>4</sup>

This town meeting came to us from New England, where the electors of a town assembled at an appointed place to elect their officers and transact the business of the town. This was the practice in Illinois for many years, but was changed by the legislature as to the election of officers; still leaving the town meeting for the transaction of miscellaneous business and such other purposes as the legislature might see fit to have brought up at the

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4. Illinois Revised Statutes, Ch. 139, Art 6, Sec 3.

town meeting. So the legislature has seen fit to provide for the voting of a special tax or a bond issue for hard road purposes at the annual town meeting and not at the annual town election; although, if a vote is desired to be taken at any other time, a special election, and not a special town meeting, must be called for the purpose. What can be the reason for voting at a town meeting in one instance and at a town election in another? This is merely the result of a careless drafting of the bill. The draftsman probably did not know, or did not consider, the difference between a town meeting and a town election. However that may be, the provisions are there and all that the electors and officers can do is to follow them until they are duly and properly changed.

That the voting must be done at the annual town meeting unless a special election is called is sufficiently clear. A similar provision regarding the voting at a town meeting was provided for in the road and bridge act of 1883,<sup>5</sup> and the validity of a vote at an election has been squarely presented to the Supreme Court.<sup>6</sup> The court in considering that case says:

"The power possessed by these meetings cannot be exercised by the electors by casting ballots at an election called and held in the different voting precincts in the town. The attempt to exercise the powers vested in the town meeting by a special election held in the different voting precincts of the town was illegal, and the tax levy by virtue of such election is void, and in the eye of the law void taxes are unjust and uncollectible."

Therefore, a special tax or a bond issue voted for in the several precincts in a township at the annual town election is unquestionably illegal.<sup>7</sup>

The necessity for constructing hard roads in Illinois through the smaller cities or villages exists, and has been provided for in the present road and bridge act,<sup>8</sup> which reads as follows:

"Whenever a special tax shall have been levied under the provisions of this subdivision of this act, the commissioners of highways of any town or district may by agreement with the city council or board of trustees of any city or village of less than ten thousand population, extend any road improved under the provisions of this subdivision within or through the corporate limits of such city or village: Provided, such extension within such city or village shall be of the same cost and kind of material as the road outside of such city or village to be paid for out of said special tax, and after comple-

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5. Road and Bridge Act of 1883, Sec. 20.

6. *C. & E. I. R. R. Co. v. The People*, 206 Ill. 296.

7. The manner of conducting a town meeting is discussed in *Frantz v. Patterson*, 123 Ill. App. 13.

8. Road and Bridge Act, Sec. 125.

tion to be maintained by the municipal authorities of such city or village at the cost of such city or village." 9

This section, however, is hardly broad enough and is somewhat ambiguous. What does it mean when it says, "whenever a special tax shall have been voted"? It would seem to limit its application to a case where the special tax had been voted, but could it not be given a broader interpretation so as to include the bond issue. In voting for borrowing money the law provides that a tax is to be levied to pay the bonds, and such tax is automatically extended by the registering of the bond issue with the county clerk. Because of the ambiguity, the section should be made plain beyond the peradventure of a doubt.

It is clear that this section does not permit the building of a road exclusively within such city or village. Conditions exist in many places where it would be advisable for the township to construct a road entirely within a city or village. The legislature should, therefore, amend section 125 to make it broad enough to permit the building of roads entirely within such city or village. It would appear desirable also that the General Assembly revise the entire hard road subdivision of the road and bridge act, so that its provisions may be absolutely clear, and so that the existing inconveniences may be avoided.

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9. The provision is constitutional: *The People v. Warley*, 260 Ill. 536; *The People v. Green*, 256 Ill. 39, p. 45.

# ILLINOIS LAW REVIEW

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## EDITORIAL NOTES

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### MEETING OF THE AMERICAN SOCIETY OF MILITARY LAW.

The annual meeting of the Society was held in Chicago, on August 30, 1916.

Captain Ridley McLean, president of the Society, addressed the meeting and spoke, in part, as follows:

"A field of usefulness offers in this Society. It offers a medium of exchange of the legal ideas of the professional military man and military ideas of the professional lawyer; with this interchange of

thought the result must be that the ideas upon the subject of military law will emerge improved on the one hand from a judicial point of view by the touch of the professional lawyer; and on the military side, by the touch of the professional military man. In my imagination I look forward, in view of the recent legislation upon matters military, to the leavening effect of this Society extending to the military forces of each of the states of the union, the effect being even reflected in the military codes of the regular army and navy.

"By carrying out its aims it is believed that the American Society of Military Law, will become a powerful link between the legal fraternities and the military fraternities to the improvement of both. The activities of this Society are educational. I rarely hear civilians talk on the subject of military law without feeling a violation done to my ideas of military efficiency; doubtless few civilians in the legal profession hear me talk without doing violence to their ideas of the law."

The following papers were presented: "The Pioneer's Military Establishment—A Question of the Constitution," by Thos. W. Shelton, Esq., Judge Advocate General of Virginia; "The Legal Status of the National Guard Under the Army Re-organization Bill," by Col. B. M. Chipperfield of the Illinois National Guard; "National Defense—Constitutional Difficulties," by Col. Nathan William MacChesney, Judge Advocate of Illinois National Guard; and "The Extent to which Obedience to Military Orders would Justify the Commission of acts which would otherwise be Punishable in a Civil Court," by Capt. Arthur W. Brown, U. S. Army, Acting Judge Advocate Central Dept., Chicago, Ill.

The following officers were elected: president: Lieut. Col. B. M. Chipperfield, Judge Advocate General, National Guard, Congressman-at-large from Illinois; secretary-treasurer: Dean H. W. Ballantine, University of Illinois, College of Law; executive committee: Chairman, Col. John A. Hull, U. S. Army, Judge Advocate Central Department, Capt. A. W. Brown, Acting Judge Advocate, U. S. Army, Lieut. Col. George S. Wallace, West Virginia National Guard, Huntington, West Virginia, James W. Garner, Prof. of Political Science, University of Illinois, Capt. Ridley McLean, Judge Advocate General, U. S. Navy, Lieut. Col. Thomas W. Shelton, Judge Advocate General, Virginia National Guard, Norfolk, Va.

The number of members during the year 1915-16 was fifty-six.

H. W. BALLANTINE.

## THE FOUR-YEAR LAW COURSE

Senator Elihu Root, at the meeting of the American Bar Association in August last, devoted his presidential address to "The Call of the Bar to Public Service," and as a main remedy for the imperfections of our system of justice he emphasized the need of a broader and more comprehensive legal education.

The Section of Legal Education (of the American Bar Association), in joint session with the state boards of bar examiners, also in August last, voted unanimously to adopt rule XI of the Model Rules for Admission to the Bar, requiring four years of preparation for all applicants, of which the first three years must be, and the fourth year may be, spent in a law school.

Northwestern University, in this November, by successive votes of the faculty of law, the university council, and the board of trustees, prescribes four years of law studies (eighty-eight units) for the law degree; the rule to be effective from September, 1918.

The president of the Association of American Law Schools, Professor Walter W. Cook, of Yale University (formerly of the University of Chicago), in his presidential address at the annual meeting on December 28, will recommend that four years of law school studies be required for the law degree.

These four events, coming in rapid succession, mark the culminating moment of long maturing convictions, which have rendered the new step inevitable. They will focus the attention of the law school world on this new measure; and they point to its speedy and general acceptance.

The measure is neither local nor radical. It is merely a necessary result of changed conditions universally recognized as requiring more extensive preparation in the professional or applied sciences. A fifth year of work for the medical degree is now in course of adoption; and a fourth year in law preparation is the corresponding step. Ten years ago the French faculties of law debated and favored the requirement of a fourth year; and only the increased burden of military service prevented the adoption of the rule. Nearly twenty years ago the German faculties of law voted in favor of the principle; for at least the same period Bavaria and Württemberg have required four years; and in 1902 the Prussian Government attempted, though unsuccessfully, to lengthen the university periods to three and one-half years. Austria has for a still longer time been on the four-year basis. All of the German coun-



tries now require three or four years of apprenticeship in practice, additionally.

Of the numerous considerations to which such a proposal gives rise, let us here notice a few only.

1. Can the modern demand for instruction of the new generation in jurisprudence, legislation, criminology, and other broadening fields of legal science, be met by an *optional* fourth year only?

Many of us had faith that it could be so met. But that faith is now proved utterly groundless. An experiment on the most apt scale has furnished that proof. Harvard University has had for many years more than 700 students in its law school, and the prestige of that university has made its student body representative of the most ambitious young men, from all over the country, destined for the legal profession. To this representative body has been offered an optional fourth year, for a period of five years past. In that period the average number of men taking the fourth year has been *less than one per cent.* of the total body. Moreover, it has also retained less than one per cent of each graduating class; for almost all the fourth-year students were graduates or professors from other law schools, and not regular members of the third-year class staying over for a fourth year.

A few other schools have been offering an optional fourth year. But the experience of Harvard University is sufficient as a basis of observation, because the conditions were there most favorable for the experiment.

What does this prove? It proves that the *optional* fourth year is a failure, in so far as it might be expected to effect any impression on an appreciable fraction of the body of new lawyers.

It follows that, if the group of studies in question is deemed to be necessary for *all* of the best young men now entering the bar, the fourth year must be *required*, and not be left optional.

That it is necessary for *all* of the ambitious and aspiring young men, we now maintain. No one, to be sure, need expect to impose on the whole of the new generation the highest and broadest training. There will always be, in this country of ours, different diets for different digestions. There are still today two-year schools; or, if one desires to put it so, many schools of inferior grade. The superior schools put forth their standards as meet for those who desire the best preparation. These three-year schools must now become four-year schools; and the others will then become three-year

schools. The cleavage will probably always remain. But in those schools which have convictions as to the requirements of the best standards, there is no reason why they should be satisfied to see those standards applied to only one per cent of even the aspiring class of students. *All* of the clientage of those schools should be brought to the test of those standards. The difference between the best prepared and the less well prepared should be represented, as heretofore, not by a variance within the clientage of a particular school, but by the cleavage between one group of schools and the other group.

In short, then, the optional fourth year will never succeed in producing any appreciable effect on the best group of new lawyers. They can be reached, as a group, only by making the fourth year a required one. If we are regardful of practical influence upon the bar, we must wish to see a large proportion, and not merely a minute handful of them, subjected to the best preparation.

2. *Does the four-year law course involve too great a burden, in that it would require extensive additions to the staff in the faculties of law?*

We believe not. And the reason is a very simple one: In many or most of the schools in the Association of American Law Schools the curriculum is already so overloaded, beyond the capacity of even the most industrious students, that a mere expansion of the present curriculum, accordion-like, will provide a four-year curriculum which would still contain more than any student can hope to complete.

This aspect was carefully studied by the authorities of Northwestern University; and the data presented by their experience may therefore serve as an illustration. Other schools' experience would probably tally closely.

The courses in the present curriculum figured up a total of 141 units (by the semester-hour reckoning). This included several subjects, added in the last few years, of the kind needed for the new demands of the time. Some of the courses had hitherto been grouped as a recommended optional fourth year; but all were scheduled in the three-year curriculum and were actually pursued by students in varying numbers. The total represented the range of studies which by today's standards ought to have a place in the training of the aspirant.

The three-year course called for 68 units for graduation (since 1915, 70 units), *i. e.* slightly more than an average of 11 week-hours per semester. Now the records of actual attainment showed that

the highest number of units of credit secured by members of the last two graduating classes were as follows:

{	Highest marks in quality (A only).....	= 83 units
{	Second highest marks in quality (A only).....	= 79 units
{	Highest marks in quantity (A and B).....	= 88 units
{	Average good marks in quantity =	{
		80-88 units (1/6 of the class)
		75-79 units (2/6 of the class)
		68-74 units (3/6 of the class)

The latter reckoning represented those students who had sought quantity rather than quality; the former represented those who had concentrated on quality. But the net result showed that even the most industrious students, in a three-year course requiring a number of units equal to about one-half of the offered curriculum, *were unable to cover additionally more than one-fifth of that one-half*. In other words, if the requirement were to be enlarged to four years and 88 or 90 units, the most industrious students could probably not cover more than 105-108 units, or less than four-fifths of the present offered curriculum. Thus, even without any enlargement at all of the present curriculum, the four-year course would still leave it impossible for even the best students to cover all that is already offered as useful for their training.

This seems to show that no additions to a staff are required, merely for the sake of a four-year course. And the truth is that in almost all schools of the best grade the curriculum has gradually reached such a state of congestion that its distribution over four years could be accomplished without any additions for the purpose.

Indeed, we believe that in most schools today many subjects have even been deliberately kept out, though deemed highly meritorious for inclusion, because of the apparent futility of attempting to insert them in an already overcrowded list. We remember that at the last meeting of the Association of Law Schools, at the symposium upon courses in legislation, the first and only doubting question asked of the principal speaker was, How could room possibly be found for that subject in a three-year curriculum? Each school can tell the tale of subjects clamoring for admission or expansion, but excluded for lack of room.

One of the greatest benefits, therefore, of the four-year course will be to permit expansion in many concededly needful directions hitherto made impracticable by the three-year limitation.

3. *How shall the curriculum be distributed over four years?*

Two kinds of subjects will naturally compete for a special place in the fourth year,—courses in procedure and practice, and courses in that newer field which (for lack of an accepted term) may be called legal science.

The former type of courses represents the demand of the bar examiner for better training in various aspects of procedure. No doubt the law office alone can furnish some things. But we are convinced that the law school can furnish most of what is needful with greater economy. And it must be remembered (as several speakers pointed out at the August meeting of the Section of Legal Education) that in the small-town regions, and even in many large cities, young graduates can obtain no place as law clerks or apprentices. Thus the task is thrust upon the schools. Here is where the Legal Aid Clinic can be put to best service. There are now some forty such societies; and the number rapidly increases; if they are brought into union with the local law schools, they can be made to supply the benefits of an office-apprenticeship most effectively. Such work under law school control could be reckoned as a minor part of the fourth year,—just as an internship in an approved hospital is credited on the fifth medical year.

The group of courses in legal science will naturally furnish some part of the fourth-year work. But to place them all there (as has usually been done with the optional fourth year) would be a mistake. These courses call for a graded series, as others do. Their best value can be attained only by introducing some of them in the second and the third years. In the new curriculum of Northwestern University, for example, Roman law is offered in the second year, as a subject which furnishes constant material for comparison in later courses in jurisprudence, evolution of law, and comparative law. So, too, courses in legislation obviously lend themselves to grading.

Moreover, some of the orthodox subjects of long standing, such as private corporations, municipal corporations, and federal jurisdiction, can now with advantage be relegated to the fourth year, because constitutional law, as a precedent third-year course, supplies many principles which hedge about the others and assists in mastering their materials. And the same is true of certain courses in procedure and in local law.

In short, a correct use of the four-year course would seem to involve a re-casting of the entire curriculum, with a view to a re-gradation of the several series wherever desirable. The educa-

tional relief that will come from the removal of the arbitrary procrustean limits of the three-year schedule is remarkable.

From all points of view, therefore, whether of science, of professional needs, or of practicability, the four-year course seems to have everything in its favor and nothing to prevent it. If it is the mark of a new era in our legal education, it is also in entire harmony with the inevitable requirements of the times and with the general trend of professional education in this country and elsewhere.

J. H. W.

## COMMENT ON RECENT CASES

**FUTURE INTERESTS—THE STATUTORY REMAINDER CREATED BY THE STATUTE ON ENTAILS.**—Wherever an estate tail is created either by the statute *de donis* direct, or by the rule in *Shelley's case* and the statute *de donis*, the difficult problem in this state is, what is the character of the remainder which the statute on Entails provides for. The statute on Entails (sec. 6 of the conveyancing act) reads that where by the common law, which clearly means the statute *de donis*, an estate tail would have been created, the tenant in tail shall be deemed to take an estate for life "and the remainder shall pass in fee simple absolute, to the person or persons whom the estate tail would, on the death of the first grantee, devisee, donee, in tail, first pass, *according to the course of the common law*, by virtue of such devise, gift, grant, or conveyance." At common law it was impossible to ascertain to whom the estate would pass until the death of the donee in tail; since, by the course of the common law, the estate tail at that time passed regularly by descent to the first tenant in tail's heir-at-law, provided such heir-at-law was of the issue of the body of the tenant in tail (*John de Mandeville's Case*, Co. Lit. 26b), and since no one can be the heir of a living person. The remainder by the statute was in terms one expressly limited to the "heirs of the body" of the tenant in tail, who took the statutory life estate, and the "heirs of the body" took by the statute in fee simple absolute. The remainder, then, was, as clearly as words could make it, subject to a condition precedent and the conditional element was incorporated into the description of the remainderman. The case under the common law authorities would be one of the typical examples of a contingent remainder: (8 ILLINOIS LAW REVIEW, 234).

It would be equally a contingent remainder under the rule in *Aetna Life Insurance Co. v. Hoppin*, 249 Ill. 406, and *McCampbell v. Mason*, 151 Ill. 500. In Arkansas and Vermont, which have statutes on entails in precisely the same form as the Illinois act, the statutory remainder is held to be contingent: (*Horsley v. Hilburn*, 44 Ark. 458, 476; *In re Estate Kelso*, 69 Vt. 272; *In re Wells' Estate*, 69 Vt. 388).

The only possible way in which to hold such a remainder vested would be to apply the New York statutory distinction between vested and contingent remainders: (8 ILLINOIS LAW REVIEW, 309). Under that distinct departure from the common law idea of a vested remainder, the remainder to the heirs of the body of the life tenant would be vested as soon as any child of the life tenant was born, but it would be subject to be divested if that child died before the life tenant, so that it did not turn out to be in fact one of the heirs of the body of the life tenant at the life tenant's death.

The cases in which the Illinois Supreme Court has dealt with, or appeared to deal with, the character of the statutory remainder created by the statute on entails, in their chronological order, are

as follows: *Voris v. Sloan*, 68 Ill. 588; *Butler v. Huestis*, 68 Ill. 594; *Lehndorf v. Cope*, 122 Ill. 317; *Welliver v. Jones*, 166 Ill. 80; *Kyner v. Boll*, 182 Ill. 171; *Moore v. Reddel*, 259 Ill. 36; *Winchell v. Winchell*, 259 Ill. 471.

An analysis of *Voris v. Sloan* will show that it did not purport to construe the statute on entails at all. The limitations involved were to Francis and Samuel Voris, as trustees in trust, for

"The use and behoof solely of the said Christiana Morton and the heirs of her body, forever; and upon the decease of the said parties of the second part, then the legal title to the said premises is to be and remain in the said Christiana Morton during her natural life, with a remainder to the heirs of her body; and in case she should die without *issue*, then, in that case, the legal title to revert to the said party of the first part or his heirs."

These limitations were taken as if they created an active trust, although, as the statement goes, the trust would seem to be passive and executed by the statute of uses. Mrs. Sloan, as the life tenant and as the guardian for her children, filed a bill to have the property sold. The surviving trustee was the only party defendant. The sale was ordered and it was decreed that out of the proceeds Mrs. Sloan should receive the value of her life estate and hold the balance as guardian for her children. This was affirmed except that it was held that on the death of two children already deceased, their shares descended to their mother in part, who was entitled on that ground to a portion of the principal. This could only be supported on the theory that the children took absolute indefeasible interests when born. The court received no aid from any counsel opposed to the interests of Mrs. Sloan, the life tenant. No basis upon which the children took an absolute and indefeasible fee on birth is directly stated by the court. The clearest ground for the result reached is that the gift over "in case the life tenant should die without *issue*," by reference caused "heirs of the body" to mean "issue." The result of this would be that each issue on birth took a vested and indefeasible interest, subject only to open and let in other members of the class.

*Voris v. Sloan* cannot possibly go upon the ground that the statute on entails applied, because the court held the children took not only absolute, but also indefeasible interests, while in the very next case reported, *Butler v. Huestis*, 68 Ill. 594, the court distinctly declared: (p. 598), that the remainder created by the statute on entails was subject to be defeated by the death of children before the life tenant. The words of the court are:

"Mrs. Huestis, under our statute [on entails], would take a life estate in the property, and the remainder would pass in fee simple absolute to her children, although it might open to let in after-born children, and *be divested as to such as should die before the determination of the life estate.*"

If, therefore, the holding of *Voris v. Sloan*, that the children take absolute and indefeasible interests on birth depends on the statute on entails, then it is absolutely *contra* to the above *dicta* in the very next case of *Butler v. Huestis*, decided at the same time. Such inconsistency is not to be assumed unless absolutely necessary and inevitable. It is not necessary to place our Supreme Court in

the position of such inconsistency. The way out is the explanation just given, that the gift over in *Voris v. Sloan* "if the life tenant should die without issue," causes "heirs of the body" to be construed "issue."

It is true that the Illinois Supreme Court in *Voris v. Sloan* said (p. 592):

"Had the deed contained no limitation over to the grantor or his heirs, then it is manifest that, by the statute *de donis*, the heirs of her body would have taken an estate tail, but as entails have been abolished by our conveyance act they would at birth have taken a fee."

It is very difficult to tell what this means. The following explanation is believed to be correct: Omitting the gift over, there would have been a straight gift to A for life, remainder to the heirs of her body. Assuming the rule in *Shelley's case* did not apply, A would have a life estate. But what estate would the heirs of the body have had by way of remainder? Under the common law strictly they would have had a remainder in tail. The statute on entails would, then, apply to this remainder in tail to the heirs of the body of the life tenant, turning the remaindermen in tail into tenants for life, with a further remainder in fee simple to the heirs of their bodies. The court, however, regarded this as an absurd result. It regarded the indirect effect of the statute on entails as sufficient to warrant the holding that when the heirs of the body of the life tenant took in remainder, they would take a *fee simple*, as if the words of limitation indicating a fee simple had been added, thereby terminating a further entailing at once.

In *Butler v. Huestis* the only point involved was whether a general power in Mrs. Butler to appoint the fee simple in the property in question was well exercised. The power was obviously a general power and the court held that it was well exercised by an appointment to Mrs. Huestis for life, with "the reversion and fee thereof to the heirs of her body at and after her decease." The court, however, in *Butler v. Huestis*, issued an extensive and varied amount of *dicta*. One was that which has already been quoted. On the assumption that the statute on entails was applicable the court said (p. 598):

"Mrs. Huestis, under our statute [on entails], would take a life estate in the property, and the remainder would pass in fee simple absolute to her children, although it might open to let in after-born children, and *be divested as to such as should die before the determination of the life estate.*"

We find the same dictum in *Lehndorf v. Cope*, 122 Ill. 317, at 331. There the court said:

"The person to whom the remainder is limited is ascertained, the event upon which it is to take effect is certain to happen, and *although it may be defeated by the death of such person before the determination of the particular estate*, it is a vested remainder."

Both these *dicta* indicate a reading of the statute on entails which limits the statutory remainder to the class of persons who answer the description of the life tenant's "heirs of the body" at the life tenant's death. The view so clearly expressed in *Lehndorf*



*v. Cope*, that the remainder was nevertheless *vested* in children as soon as born and during the life tenant's life, plainly proceeds upon the application of the New York statutory definition which our Supreme Court for some time failed to perceive was different from the common law definition. It, therefore, kept cropping up in the opinions of the court from time to time and finally culminated in the actual holding of *Boatman v. Boatman*, 198 Ill. 414. It was not definitely and entirely eliminated until *Golladay v. Knock*, 235 Ill. 412. This last case exposes the entire fallacy of the New York statutory definition and lays its application forever at rest in this state. It was error for the court in *Lehndorf v. Cope* to say that the statutory remainder was vested, and since *Golladay v. Knock*, it is believed the Illinois Supreme Court could not, while taking the statute on entails literally, as creating a remainder to those who answered the description of the heirs of the body of the life tenant, at the life tenant's death call the remainder vested.

But before the New York statutory definition of a vested remainder was exposed and repudiated in *Golladay v. Knock*, the Illinois Supreme Court in *Welliver v. Jones*, 166 Ill. 80, and *Kyner v. Boll*, 182 Ill. 171, took a further and most extraordinary step, by holding the statutory remainder not only vested at once upon the birth of a child of the life tenant, but also *not subject to be divested by the death of the child before the life tenant*. This result threw overboard entirely the language of the statute and changed it to read that the statutory remainder was in the "children" of the tenant in tail, the statutory life tenant. It also threw overboard the express *dicta* of the court in *Butler v. Huestis* and *Lehndorf v. Cope*. The decisions reached in *Welliver v. Jones* and *Kyner v. Boll*, were hardly such as to establish for the conveying profession the extraordinary proposition which they apparently hold. *Welliver v. Jones*, was not argued except upon one side, the side that was interested in securing the decision rendered. There is no reliance upon *Voris v. Sloan*, but only upon *Butler v. Huestis* and *Lehndorf v. Cope*. But the *dicta* of these last two cases, as we have already observed, do not support any such holding, as that the remainder is limited by the statute to "children" or "issue," so that it is not subject to be divested if a child dies before the life tenant. The opinion in *Welliver v. Jones*, shows no perception by the court of the actual problem before it, or any analysis of the language of the statute on entails. Its total disregard of the *dicta* of *Butler v. Huestis* and *Lehndorf v. Cope*, that the statutory remainder was subject to be divested, has already been commented upon. *Kyner v. Boll*, reached the same result as *Welliver v. Jones*, but no contest appears to have been made on this point of the case. *Welliver v. Jones*, was not cited. *Voris v. Sloan*, was not cited for the point that the children took indefeasible interests in remainder when born. The *dicta* of *Butler v. Huestis* and *Lehndorf v. Cope*, to the contrary, were not noticed.

Then came *Golladay v. Knock*, 235 Ill. 412, disposing entirely of the New York statutory definition of a vested remainder and point-

ing to a complete return to the common law. After that came *Aetna Life Insurance Company v. Hoppin*, 249 Ill. 406, holding directly that a remainder to "the heirs of the body" of the life tenant, with words of limitation showing that they were to take the fee, created a contingent remainder in those persons who answered the description of heirs of the life tenant at the life tenant's death. In short, the moment a testator or settlor by express words provided for the limitation which the statute on entails expressly provided for, our Supreme Court held the remainder contingent.

Finally, we have the recent decisions of the Illinois Supreme Court in *Moore v. Reddel*, 259 Ill. 36 and *Winchell v. Winchell*, 259 Ill. 471. These assert, after a contest and upon full consideration, that the statute on entails creates a life estate in the first taker, with a remainder in fee vested and indefeasible in the children of the life tenant as soon as such children are born. The court relies upon *Voris v. Sloan*, which, as we have already seen, cannot be regarded as dealing with the point. It relies also upon *Butler v. Huestis* and *Lehndorf v. Cope*, which, as we have already seen, contain distinct *dicta* that the remainder if regarded as vested in the presumptive or expectant heir, according to the New York statutory definition, was nevertheless subject to be divested by the death of such presumptive or expectant heir before the death of the life tenant. The court then had only *Welliver v. Jones* and *Kyner v. Boll*, upon which to rely.

A remarkable feature of the opinion in *Moore v. Reddel*, is its frank admission that the actual language of the statute on entails has been consciously disregarded by the court and other language meaning an entirely different thing substituted. Our Supreme Court plainly states that because the actual language of the statute on entails would result in what the court believed to be certain incongruities, it should be expressly disregarded and other language substituted, which would avoid the supposed incongruities. The opinion of the court states (p. 43).

"The language employed [in the statute on entails] was that the remainder should pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, devisee, donee in tail, first pass according to the course of the common law, by virtue of the devise, gift, grant or conveyance. When the question came before the court it was clear that *this provision could not be construed according to the words used*, and that the general assembly never intended that the remainder should pass to the person or persons to whom an estate tail would have passed according to the course of the common law."

Again the court says (p. 44):

"*Inasmuch as the language of the act could not be adopted as expressing the legislative intent*, it was not unreasonable to hold that the purpose of the act was to provide that issue which was in existence at the time of the grant or should be born afterward should be invested with the fee simple and the reversion in the grantor be destroyed."

The incongruity sought to be avoided was that by the course of the common law the eldest son would inherit the estate tail by

the rule of primogeniture. It should be noted, however, that the Supreme Court of Missouri, construing the Missouri statute on entails of 1825, from which the Illinois statute was copied in 1827, did not feel at liberty to disregard the language used by the legislature and held that the eldest son was entitled and that the remainder passed strictly to the persons who would at common law have taken the estate tail (*Frame v. Humphreys*, 164 Mo. 336; *Burris v. Page*, 12 Mo. 358). If, however, our court had insisted upon avoiding the absurdity it might well have done so by injecting the terms of the statute on descent so far as it applied to lineal descent. Thus, "heirs of the body" as determined by our statute relating to lineal descent, would have taken the remainder in fee. This is the utmost departure from the terms of the statute for which, it is believed, any justification can be found.

The troubles of our Supreme Court with the statute on entails, as it is now dealt with, have only just begun. Suppose, for instance, that when the deed or will takes effect which creates the estate tail, the life tenant has living one child and three children of a deceased child. Are the children of the deceased child included? They are not children of the life tenant—they are issue. If they are included so as to share in the remainder it is because the statute on entails is read as limiting the remainder to "issue." If that be so, then the question arises whether the issue take *per capita* or *per stirpes*. The general rule is that a limitation merely to issue of a living person includes all the issue *per capita*, even though in so doing some issue take shares along with their living ancestors. (6 ILL. LAW REV., 218-220.) To prevent this the court must add some new phrase to the statute, such as, that the remainder shall be limited to issue *per stirpes*, the children of any deceased child or other issue to take only the share their parent would have taken. Then what is to be done when an estate tail special is created, *i. e.* to A and the heirs female of his body? If the language of the statute be followed the result is clear, and only the females will take the remainder. But if the statute has been re-written by the court so that the remainder is to "children" or "issue" of the tenant in tail, then more language must be read into the act in order to restrict the remainder to a part only of the children or a part only of the issue when an estate tail special is created.

No doubt the legislature was unhappy in the statute on entails which it adopted. One may venture a regret, however, that our Supreme Court has tried to patch up this legislative absurdity. Under the course pursued thus far some difficulties have been eliminated only to give rise to others that are still unsettled. An adherence to the plain language of the act might have resulted in absurdity sufficient to induce the appropriate legislative change. In any event, the results under the statute on entails would have been clear and certain.

A. M. K.

CARRIERS—BILL OF LADING—CARMACK AMENDMENT.—The case of *Atchison, Topeka, and Santa Fe Railway Co. v. Harold*, 36

Sup. Ct. Rep. 665, extends a step further the scope of the Carmack amendment. Previous decisions had established that that statute had superseded local rules with respect to the liability and the limitation of liability of common carriers in interstate transportation of goods, and had substituted, in lieu thereof, the rules laid down by the federal courts. In the instant case it was held that the statute prevented the application of an estoppel, under local rules of law, in favor of a purchaser of an order bill of lading, against a railroad carrier, precluding the latter from showing that a bill of lading issued by it was in fact issued in exchange, and substitution for another bill of lading issued by another and connecting railroad, and that the car had not at the date of the last bill of lading been received by the railroad so issuing it, and was, in fact, not received till much later, owing to the default of the other railroad. In the instant case a carload of corn was shipped *via* the Union Pacif. R. R. Co. from a Nebraska point to Topeka, Kansas, with direction to notify the C. V. F. G. Company. The latter company purchased the bill of lading pending the transportation, whereupon the old bill of lading was taken up, and a new order bill of lading for shipment to Elk Falls, Kansas, was issued by the defendant railroad dated at Kansas City, Mo., September 24, 1910. Harold purchased this latter bill of lading. As a matter of fact the car was not, at the date of this bill of lading, in the possession of the defendant railroad, and was not received by it till considerably later, the delay being due to the default of the initial carrier, the Union Pacific Railroad Company. If the above facts could be shown, it was conceded the defendant was not liable, since it did not cause the delay. The state court, applying local doctrines, held that the defendant railroad was estopped as against Harold, a purchaser without notice, from denying its possession of the car on the date of its bill of lading, in contradiction of the express terms thereof. The federal Supreme Court, citing a long line of familiar decisions of that Court (*Pollard v. Vinton*, 105 U. S. 57, and other cases), held that, by federal law, the estoppel applied by the state court did not exist; that the Carmack amendment superseded state rules, and substituted therefor federal rules, not merely as to liability and the limitation of liability, but also as to the operation and effect of the bill of lading in all respects; and that it was, therefore, open to the railroad company to exonerate itself, even as against the plaintiff, a purchaser for value, by showing it had not the goods in its possession on the date of its bill of lading, and that the delay in the transportation was caused by another carrier.

The objection to considering that the Carmack amendment was ever intended to substitute federal rules and doctrines in the place of state rules and doctrines has been ably urged by Prof. Goddard: ("Liability of the Common Carrier, etc.," 15 Col. L. Rev., 477.)

Assuming the principle (now fully established) that the Carmack amendment substitutes federal for local doctrines as to liability and the limitation thereof, it seems unfortunate to push that prin-

ciple to the extent of abrogating local rules as to the general effect and operation of bills of lading. As a matter of fact the rule estopping the carrier from denying, as against a purchaser without notice, the truth of the statements of the bill of lading with respect to the receipt by the carrier of the goods covered by it, seems reasonable, and much to be preferred to the federal rule on the subject. It was formerly the rule in Illinois: (*St. Louis etc. R. R. Co. v. Larned*, 103 Ill. 293,—in effect overruled by *Lake Shore etc. R. R. Co. v. Live Stock Bank*, 178 Ill. 506). It is the rule embodied in the uniform bills of lading act (U. B. of L. Act, sec. 23), adopted by many of the states. And this raises the question whether the Carmack amendment does not, under the ruling of the instant case, supersede, so far as interstate shipments are concerned, this provision of the uniform bill of lading act where that act has been adopted. It would seem quite clear that it does. See *St. Louis etc. R. R. Co. v. Woodruff Mills*, 195 Miss. 214, cited in the opinion in the instant case.

L. M. G.

**LIFE INSURANCE—WHEN STATEMENTS IN APPLICATION CONSIDERED REPRESENTATIONS, AND WAIVER OF SAME.**—The rule that statements in the application for a life insurance policy will be construed as representations rather than warranties, if rendered possible by the language and circumstances, is well illustrated by the decision in *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541 (April 20, 1916). The application, which was made a part of the policy, recited that the applicant *warranted* the truth of certain statements (which at the trial, were proven to be untrue), but contained the further agreement by the applicant, that "any untrue or fraudulent" answers would vitiate the beneficial certificate. The court (opinion by Cooke, J.), following the rule in *Continental Life Insurance Company v. Rogers* (1887), 119 Ill. 474, held the statements to be representations for the reason that if they should be considered warranties no effect would be given the provision relating to fraud inasmuch as fraud is not an essential element of a breach of warranty.

The court held, further, that the representations, although they were both untrue and material, were no bar to recovery by the beneficiary for the reason that such defense had been waived, the waiver being based upon the fact that the statements in the application were incorrectly written by the medical examiner, the facts having been truly and fully stated in good faith by the applicant, and no collusion being claimed or shown between the medical examiner and the applicant.

The decision on the first point mentioned was based upon the well settled rule that a statement in an application will be construed as a warranty only where the language is so clear as to preclude any other construction (*Spence v. Central Accident Insurance Company* (1908), 236 Ill. 444), but it is submitted that it is at least arguable if the court was justified by the provisions of the contract

before it, or by the precedents cited, in applying such rule to the facts in the principal case, since the contract was by its terms to be vitiated by any "untrue or fraudulent" answers in the application, while in both the *Rogers Case*, *supra*, and in the leading case of *Fitch v. American Popular Life Insurance Company* (1875), 59 N. Y. 557, also cited by the court, the invalidity of the policies could be claimed only in case of fraud, misrepresentation, or concealment, no alternative ground of invalidity based upon the mere untruth of the answers being presented. There seems, however, according to the general rule in Illinois, to be no doubt of the correctness of the decision on the second point mentioned, since the facts proven established a waiver or estoppel as to the defense claimed, whether the statements be considered as warranties or representations, the knowledge and acts of the medical examiner in such cases being considered those of the insurer: *Provident Life Assurance Society v. Cannon* (1903), 201 Ill. 260; *Phenix Insurance Company v. Stocks* (1893), 149 Ill. 319; *Johnson v. Royal Neighbors* (1912), 253 Ill. 570.

H. C. H.

**STREAM—WATER RIGHTS—RIGHT TO CONSTRUCT LEVEE TO DIKE OUT THE WATER.**—In *Cubbins v. Mississippi River Commission*, 241 U. S. 351, 36 Sup. 671, a bill was brought to enjoin the Mississippi River Commission and the various Levee Boards operating along the Mississippi river from carrying on their levee works. The theory of the bill seems to have been that by confining by levees the water of the river along certain portions thereof, the natural flow of the water was interfered with causing the water to go farther in at places where there were no levees and so inundate land that would not have been inundated except for the levees.

The rule that a stream should be permitted to flow as it was wont to do, does not prevent riparian owners from protecting their land against damage, the court says

"By defensive works constructed either upon the border of the rivers or in the interior of their property against either the permanent and insensible action of the rivers or streams or particularly against the damage caused by the accidental or extraordinary overflow of their banks."

This rule of exception, permitted each riparian owner to confine the river within its banks, but did not permit any interference with the flow of the water within its bed, and that at once raised the question: What is the bed of the river? This the court answers by pointing out there could be only two beds: one the space between the banks called by the court, "natural" banks (doubtless to distinguish from the levees which were built upon these "natural" banks); and the other the whole Mississippi river valley. Clearly, the court points out, the law could not mean the latter, and so must mean the former.

Upon principle the right to protect one's land from the elements, would seem unquestionable. That principle has been followed in Illinois with respect to riparian owners on lakes, the restric-

tion to the right, there, being that the owner must not go beyond the limits of his ownership, (9 ILL. LAW REV. 573). That principle too, it would seem, must account for the rule that an upper owner may accumulate his surface water and confine it in one channel and thus project it upon the lands of the lower owner, so long as he does not throw it upon the servient lands with such force as to wash away the land, where that can be avoided, (9 ILL. LAW REV. 566).

But a rule is established in Illinois, that an owner of lands is bound to receive the surface water that flows onto his lands from other lands in the natural course of drainage, and cannot dike out, or obstruct such waters so as to pile them up on the dominant lands, (9 ILL. LAW REV. 569); and one case (*Pinkstaff v. Steffy*, 216 Ill. 413) following a quotation from the American and English Encyclopedia of Law to the effect that waters which have overflowed the banks of a stream in times of freshet, in consequence of the insufficiency of the natural channel to hold them and carry them off, are surface waters, holds that the building of levees to confine the waters of a creek within a narrower channel "than what was originally the natural bottom and might be said to be a natural channel in flood time," was within this inhibition. The same case, however, says (216 Ill. 413): "Whether this law would pertain when applied to large rivers is not before us and we do not decide." The case relies upon the cases of *Gilliban v. Madison County Rd. Co.*, 49 Ill. 484, and *Gormley v. Sanford*, 52 Ill. 158, in both of which the questions were purely of embankments athwart the course of the surface water and were not cases of confining the waters of streams in certain channels. However, the case of *Groff v. Ankenbrandt*, 124 Ill. 51, it seems, did involve the right to confine the waters of a stream within a certain channel, but the case was decided on matters of pleading and whether the stream was a small creek or a "large river," does not appear.

Apparently, the only other case in Illinois that involves the right to confine the waters of a stream within a certain channel is the case of *Bradbury v. Vandalia Drainage District*, 236 Ill. 36. In that case the right to dike out flood waters of a river (Kaskaskia river) by levees, was squarely raised, and decided against the right. It does not appear from the case how large the river was, or whether it had well-defined banks as in the case of the Mississippi river.

That there is a difference between the size of the thread of a river in low water time and in high water or flood times, is common knowledge, and, possibly even, the court would take judicial notice of that. It would seem, also, not stretching the rule too far, to say it is common knowledge that a well defined river has banks beyond which ordinary high water does not rise and that it is only extraordinary flood water that rises above the banks and that in times of low water the thread of the stream is far within the banks. Further, might it not also be said that the distinguishing feature between a creek and a river, or a small river and a "large river"

is the absence or presence of banks? If that is true, then it is suggested the principal case and the case of *Pinkstaff v. Steffy*, are in accord, and what the latter case has in contemplation by the statement that it would not decide whether the rule applied to large rivers, coupled with the statement in the facts of the case that the levees served to confine the waters within a narrower channel than what was the natural channel in flood time, would indicate that the decision in the *Pinkstaff* case would have been different had the stream been one with well defined banks and the levees built upon those banks. So, also, the facts in the case of *Bradbury v. Vandalia Drainage District*, doubtless, would bring that case in accord with this principle. Unfortunately they are not sufficiently set forth for that purpose.

In fact, all of these cases, the principal case included, proceed from the same rule, the rule of the civil law. And it is at least but fair to indulge the presumption that these various decisions intended to arrive at a harmonious conclusion from the application of that rule.

E. M. L.

CORPORATE POWERS—ULTRA VIRES CONTRACTS.—*Calumet & Chicago Canal & Dock Co. v. Conkling*, 273 Ill. 318; *Mercantile Trust Co. v. Kastor*, 273 Ill. 332. The first of these cases was foreclosure. The Canal Company was organized by special charter in 1869 to construct a canal from some point on the Calumet River to the south branch of the Chicago River. Its charter gave it power to purchase, possess, and occupy real and personal estate, to sell, lease, and employ the same in such manner as it should determine, and to have all powers necessary to carry out the objects of the act. The canal was never dug; but the company purchased a large amount of real estate. In 1909 it owned with other property block 139. The defendant Conkling owned block 138 adjoining, and had a loan maturing on it. He applied to the Canal Company for a loan, and was refused. Later he offered to purchase block 139 for \$15,000.00, if the whole purchase price should be in the form of a note and mortgage and if the Canal Company would loan him \$35,000.00 more. This was agreed to; a conveyance was made and a mortgage given to the Canal Company on both blocks to secure the payment of \$50,000.00. Conkling defaulted and went into bankruptcy. The Canal Company filed this suit for foreclosure. The trustee in bankruptcy defended on the ground that the loan was *ultra vires* and void.

The power to loan money was not expressly granted in the Canal Company's charter. It was urged, however, by the Canal Company that it had the power to loan as an incident to the power to sell its real estate. In discussing this point the court said that it is against public policy for a corporation to acquire land not necessary for its corporate purpose; but that this company had the power to sell its land however acquired. That the sale was made not for the purpose of carrying out its objects, but rather as



a step in liquidation; and that implied powers exist only for the purpose of enabling a corporation to carry out the purpose of its creation. Hence, in liquidation, the power to loan money in order to induce the sale of land cannot be implied. Yet it could sell the land and take the purchase money in the form of a mortgage; and to the extent of the selling price of \$15,000.00 the mortgage was held valid. The loan in excess of the purchase money was therefore held unlawful. In other words the court held that the corporation had the power to sell the land for any form of consideration, but it had no power in liquidating to float a loan on the sale.

This reasoning may be difficult of application in some cases, but it is not illogical. It should be noticed, however, that the court has thus put a narrow construction on the law of implied powers in general, and that it has denied to a corporation in liquidation an implied power which seems fully as necessary for it to possess at such a time as at any other. When a corporation is liquidating it *must* sell, and an interpretation of its implied powers as the same at that time as at any other would seem clearer in application and of no injury to the public.

But the interpretation of the surplus loan as invalid on collateral attack is the most important feature of the decision; for the opinion of the majority fails to recognize the difference between a strictly *ultra vires* act and one in abuse of power. On this point Mr. Justice Carter's dissenting opinion is clear. The corporation had power to loan some money (i. e. the purchase price) as an inducement for the sale; hence on collateral attack the loaning of more than this should be regarded at most as a mere abuse of its powers and not strictly *ultra vires*. The dissenting opinion goes on to urge the adoption in this state of the principle that the defense of *ultra vires* may not be made upon collateral attack unless a statute clearly specifies otherwise, and quotes Thompson to the effect that the more modern as well as the correct rule is that the corporation may recover unless the statute says that it shall not.

The adoption of the rule thus urged by Mr. Justice Carter would certainly constitute a great improvement in our law. For the opinion in *Mercantile Trust Co. v. Kastor*, 273 Ill. 332, again raises serious doubt as to whether the difference between strictly *ultra vires* acts and those in abuse of power is still to be recognized. Here a contract to purchase open accounts was construed as a loan in violation of the usury law. Suit was brought by the lending corporation against Kastor on his individual guaranty of this loan. The court held that the Mercantile Trust Company had neither express nor implied power to make the loan; that it was not made as incidental to any authorized corporate business. The transaction was therefore held *ultra vires* and void, and recovery on the guaranty was denied.

The finding of the court that the Mercantile Trust Company thus made an unlawful contract is in harmony with the statement of the law in the *Canal case supra*. It is also in harmony with previous decisions: (*Penn v. Bornman*, 102 Ill. 253; *Leigh v.*

*American Brake-Beam Co.*, 205 Ill. 147.) But in discussing the question of whether the doctrine of estoppel could be involved, the court said:

"The cases in which the doctrine of estoppel has been recognized have been where the act complained of was within the general scope of the corporate powers, but there has been some irregularity in their exercise," thus omitting from the class where estoppel may be raised that large number of cases where the act in question is an abuse of power and not strictly *ultra vires*. This omission becomes significant when taken in connection with the opinion in the *Canal case*.

The court properly denied recovery on the common counts because the suit was against a guarantor, who apparently received no direct personal benefit from the loan. For while it has been established that recovery may be secured against a guarantor of an *ultra vires* contract in this way, such recovery has so far been limited to the actual amount received by such guarantor as a part of the proceeds of the transaction: (*Citizen's Central Nat. Bank v. Appleton*, 216 U. S. 196).

W. B. H.

LICENSES—PRESCRIPTION.—In Georgia, it appears, the estoppel theory doctrine of *Rerick v. Kern*, 14 S. & R. 267: (see 9 ILL. LAW REV. 282), has been codified, and is the law in that state. At least that would seem to be the purport of the recent case, *Western Union Tel. Co. v. Georgia R. & Banking Co.*, 227 Fed. 276-281, where an executed parol license was held irrevocable. This is contrary to the law of this state: 9 ILL. LAW REV. 281. That case, however, in connection with a point of prescription, contains a valuable suggestion which might profitably be considered in connection with the *note*, 10 ILL. LAW REV. 307. Thus, upon the point that prescription must be adverse and not permissive, and following out the rule that even though permissive at the start, user may become sufficiently adverse to ripen into a prescriptive right, it is suggested that where a parol license is given, and the licensee expends money and erects structures upon the faith of the license, that very act is so inconsistent with the intention to have a license as to indicate adverse user, 227 Fed. 283.

E. M. L.

# ILLINOIS LAW REVIEW

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## SOLICITORS' FEES IN WILL CASES

BY ALBERT M. KALES<sup>1</sup>

Trustees are entitled to their reasonable expenses and solicitors' fees incurred in suits to construe the ambiguous terms of the trust.<sup>2</sup> The ground for this is, the trustee is entitled to be indemnified for expenditures made by him in behalf of the estate. He is entitled to credit for the sum so expended when he produces his final accounts for approval,<sup>3</sup> or he may have the amount allowed him in the suit to construe.<sup>4</sup> In the latter case the allowance made is not in any proper sense costs or taxed costs. It is merely a convenient method of determining what the trustee may charge the estate, and at the same time adjudicating the matter as against the *cestui que trust* who is a party.

In a chancery suit to determine the proper construction to be given the ambiguous terms of a testamentary trust, the court as a rule requires the taxable costs to be paid out of the corpus of the trust estate.<sup>5</sup> This proceeds on the ground that chancery is given a discretion in directing the payment of taxable costs,<sup>6</sup> and because it seems fair that volunteers who claim under a testator who was responsible for using words ambiguously and thereby requiring a suit to construe should pay the costs, and divide the costs among them in proportion to the amount of the property they receive. It follows that the above rule as to costs applies equally in any chancery suit where the object is to construe the ambiguous terms of a will,—viz., a bill to partition legal estates or to remove a cloud from legal estates.

1. Professor of Law, Harvard University School of Law.

2. *Leman v. Sherman*, 137 Ill. 94; *Downing v. Marshall*, 37 N. Y. 380; *In re Donge's Estate*, 103 Wis. 497, 513.

3. *Leman v. Sherman*, *supra*.

4. *Downing v. Marshall*, *supra*.

5. *Missionary Society v. Mead*, 131 Ill. 338, 375; *Smith v. Smith*, 4 Paige Ch. 271; *Jolliffe v. East*, 3 B. C. C. 25; *Studholme v. Hodgson*, 3 P. Wms. 300; *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Straw v. Societies*, 67 Me. 493; *Deane v. Home*, 177 Mass. 132.

6. This discretion is confirmed by R. S. 1874 Ch. 23, Sec. 18.

The Illinois Supreme Court has held that in a suit to construe the ambiguous terms of a testamentary trust the court may ascertain and allow a reasonable solicitor's fee to parties other than the trustee and require the same to be paid out of the trust estate. This rule has been asserted and applied in many cases in Illinois.<sup>7</sup> It makes no difference whether the suit is commenced by the trustee<sup>8</sup> or by a *cestui que trust*<sup>9</sup> or by one who has a claim as a *cestui que trust* by the terms of the instrument<sup>10</sup> or by operation of law because the express trust failed.<sup>11</sup> The allowance is made not only to those who are successful in their contentions but to those who are unsuccessful.<sup>12</sup> It is always made as a part of the taxable costs of the suit to construe.<sup>13</sup> Inferentially, the parties to whom the allowance is made have no claim in assumpsit or otherwise than in the suit to construe. They do not recover on any theory of being indemnified.<sup>14</sup> This is consistent with *Leman v. Sherman*.<sup>15</sup> There the *de facto* successor in trust appointed under a void power was not permitted, in a suit to approve his accounts, to have credit for solicitors' fees expended by him in prosecuting an appeal from the decree which found the power under which he was appointed to be void. This went upon the ground that the *de facto* trustee had appealed solely in his own interest. *A fortiori* a *cestui que trust* or other party to a bill to construe who is clearly acting solely in his own interest, both in the court below as well as in the court above, can have no reimbursement for solicitors' fees on any ground of indemnity.

There are serious difficulties in the way of supporting this allowance of solicitors' fees.

7. *Missionary Society v. Mead*, 131 Ill. 338, 375; *McLean v. Thomas*, 159 Ill. 227, 236; *Ingraham v. Ingraham*, 169 Ill. 432, 471; *Arnold v. Alden*, 173 Ill. 229, 242; *Lombard v. Witbeck*, 173 Ill. 396, 412; *Lewis v. Sedgwick*, 223 Ill. 213, 221; *Hitchcock v. Board of Home Missions*, 259 Ill. 288, 304; *Dean v. Northern Trust Co.*, 266 Ill. 210; *Guerin v. Guerin*, 270 Ill. 239, 250.

8. *Missionary Society v. Mead*, *supra*; *Lombard v. Witbeck*, *supra*; *Hitchcock v. Board of Home Missions*, *supra*; *Wilson v. Clayburgh*, 215 Ill. 506; *Kendall v. Taylor*, 245 Ill. 617, 620.

9. *McLean v. Thomas*, 159 Ill. 227, 237; *Guerin v. Guerin*, 270 Ill. 239, 240, 250.

10. *Dean v. Northern Trust Co.*, 266 Ill. 205, 207, 210.

11. *Ingraham v. Ingraham*, 169 Ill. 432, 471; *Lewis v. Sedgwick*, 223 Ill. 213, 220.

12. *Missionary Society v. Mead*, 131 Ill. 338, 375; *Ingraham v. Ingraham*, *supra*; *Guerin v. Guerin*, *supra*.

13. *Lombard v. Witbeck*, 173 Ill. 396, 412; *Ingraham v. Ingraham*, *supra*; *Wilson v. Clayburgh*, 215 Ill. 506; *Missionary Society v. Mead*, *supra*; *Straw v. Societies*, 67 Me. 493.

14. *Downing v. Marshal*, 37 N. Y. 380.

15. 137 Ill. 94.

*First:* The alleged rule<sup>16</sup> of the English cases permitting such an allowance is entirely inapplicable. To parties other than the trustee they must have been so allowed as part of the taxable costs, and by reason of the complete discretion which a court of chancery had, not only with respect to who should pay the costs which were taxed, but what elements should enter into the costs to be taxed.<sup>17</sup> It must be admitted at once, however, that in Illinois a court of chancery has no discretion as to what items shall enter into the taxable costs. By statute the general rule is, that even in chancery suits no items are included in taxable costs except what are so provided by statute.<sup>18</sup> The only discretion which is conferred upon the court is as to who shall pay the taxable costs, and not at all what items shall enter into the taxable costs. It must be further admitted that in Illinois solicitors' fees are never admitted as part of the taxable costs except by statute,<sup>19</sup> and that no statute permits solicitors' fees to be taxed as costs in suits to construe the ambiguous terms of a testamentary trust. It must be conceded also that other courts faced with similar conditions have found the objections to the allowance of solicitors' fees in the case in question insuperable.<sup>20</sup> In a recent Wisconsin case the court,<sup>21</sup> after a careful examination of the matter, and determination that no ground

16. The question has been raised whether the English chancery court actually allowed solicitors' fees regularly in this class of cases. In *Downing v. Marshall*, 37 N. Y. 380, 391 the court said: "The costs of legatees and *cestui que trust* may be, and are, in proper cases, ordered to be paid out of the fund involved in the litigation. But this means the ordinary taxable costs as between party and party, and I have found no case where such costs have been taxed as between client and solicitor, or where any special or extra allowance has been ordered."

17. *Downing v. Marshall*, *supra*; In re *Donge's Estate*, 103 Wis. 497, 516.

18. *Wilson v. Clayburgh*, 215 Ill. 506, 507.

19. *Wilson v. Clayburgh*, 215 Ill. 506, 508.

20. *Downing v. Marshall*, 37 N. Y. 380; in re *Donge's Estate*, 103 Wis. 437, 513; *Drake v. Crane*, 66 Mo. App. 495, 498.

The Illinois Supreme Court has never cited in support of its rule any American cases, except *Straw v. Societies*, 67 Me. 493; *Dean v. Home*, 111 Mass. 132; and *Noe v. Miller* 31 N. J. Eq. 234, 238. The Maine case relies only on the Massachusetts case, and the Massachusetts case simply assumes the existence of the rule. The New Jersey case relies upon an earlier New Jersey case; *Atty. Gen. v. Moore*, 4 C. E. Gr. 503. This last mentioned case relies upon an earlier New Jersey case which does not touch the point at all and upon *Redfield* upon "Wills," and *Daniels'* "Chancery Practice." The latter, of course, and the former, in fact, deals only with the practice of the English chancery court. *Redfield* cites *Maxwell v. Maxwell*, L. R. 4 H. L. 506 for the proposition that "costs on both sides, as between attorney and client, must come out of the fund," but the House of Lords' case decides only that the "costs of the appeal of both parties to be paid out of the estate." Whether these costs are determined as between attorney and client or not, does not appear.

21. In re *Donge's Estate*, 103 Wis. 437, 513.

could be found for the allowance of solicitors' fees, in effect overruled a long line of previous cases, where the propriety of such allowance had been recognized.

*Second:* It is a complete *non sequitur* that because taxable costs are required to be paid out of the whole estate, solicitors' fees to all parties should be included in the taxable costs. The Illinois Supreme Court appears always to have rested the allowance of solicitors' fees wholly upon the fact that costs were regularly required by a court of chancery to be paid out of the trust estate in suits to construe the ambiguous terms of a testamentary trust. It is one thing, however, for a court which has a discretion as to who shall pay costs, to decide that the parties entitled to a fund shall pay them in the proportion of their ownership, and quite another for the same court (which is given no discretion at all as to what items shall be included in costs) to determine that taxable costs shall include solicitors' fees to each party. The former has been left to the court's discretion, the latter has been taken out of the hands of the court by the legislature. Nor is any satisfactory construction available which will justify a single exception in favor of the exercise of the court's discretion as to what items shall make up taxable costs in the case of a suit to construe the ambiguous terms of a testamentary trust.

*Third:* The Illinois Supreme Court itself has negated any theory that solicitors' fees should be allowed because of the fault of the testator in using language so ambiguously that a suit to construe was required, and because parties other than the trustee have conferred a benefit on the estate by furnishing the arguments of counsel on the question of construction. If any such general ground for the allowance of solicitors' fees in chancery cases existed then it would apply equally whether there was a trust or not. Thus if the estates are legal, and the suit is one in partition or to remove a cloud, yet if the basis of the suit is the use of language ambiguously by a testator so that it is in reality a suit to construe the will, solicitors' fees should be allowed. No satisfactory distinction can be suggested between ambiguities in testamentary trusts, and ambiguities in wills where there is no trust. Nevertheless, in the latter case the Illinois Supreme Court holds that no solicitors' fees will be permitted.<sup>22</sup>

If the Illinois Supreme Court adheres to its ruling that upon a bill to construe the terms of an ambiguous testamentary trust the solicitors fees of all parties must be paid out of the estate, will

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22. *Kendall v. Taylor*, 245 Ill. 617.

it extend the rule so that solicitors' fees may be had by all parties for services rendered on an appeal by one of them?

The answer to this must certainly be in the negative.

Again there can be no ground for allowing solicitors' fees on the theory of an indemnity or reimbursement. The *cestui que trust* who appealed and those who followed the appeal are under no duty to the trust estate, and are appealing or following the appeal solely in their own interest.<sup>23</sup>

The solicitors' fees for services in the court below when allowed are always so allowed as part of the taxable costs incurred in the trial court.<sup>24</sup> It would follow that if solicitors' fees for services in the appeal court are allowed, they must be part of the costs taxable in the appeal court. It would follow that the trial court would have no power or jurisdiction to tax such costs or allow the same. The application for the allowance of such costs should be made in the appeal court.<sup>25</sup> The moment application is so made the claim for solicitors' fees is at once met by the fact that the case is no longer in a court of chancery, but in a court exercising appellate jurisdiction, that the costs in that court are governed wholly by statute, and that solicitors' fees are not allowed as part of the costs by any statute. *Leman v. Sherman*<sup>26</sup> is conclusive that solicitors' fees for services in the appellate court cannot be recovered on any theory. In that case a *de facto* trustee acting under a void power of appointment, entitled in general to reimbursement for his expenditures on behalf of the estate, was not permitted in a suit for the approval of his final accounts to secure credit for solicitors' fees paid out by him in prosecuting an appeal from a decree finding void the power under which he was appointed.

If a trustee who appeals in an effort to sustain the validity of the power in a will under which he was appointed, and who has, therefore, not only a legitimate interest as trustee in appealing, but also a personal interest, must be regarded as appealing solely in his personal interest, and cannot obtain reimbursement for his solicitors' fees on the appeal, surely the *cestui que trust* who must even more

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23. *Leman v. Sherman*, 137 Ill. 94, where even the *de facto* trustee under a void appointment entitled to reimbursement for expenditures on behalf of the trust estate, in general, was not permitted any reimbursement for solicitors' fees paid out on an appeal from the decree holding void the power under which he was appointed.

24. *Ante*, Note 23.

25. *Fulwiler v. Welch*, 92 Ill. App. 443; *Terminal R. R. Ass'n v. Lar-kins*, 127 Ill. App. 80; *Peabody v. Mattocks*, 88 Me. 164.

26. 137 Ill. 94.

clearly be regarded as appealing solely in his own interest can not have any allowance for solicitors' fees on any ground of indemnity. If the *cestui que trust* has no ground to be indemnified on equitable principles for solicitors' fees expended by him on an appeal, surely he can stand no better, when he seeks the same fees as part of the taxed costs, contrary to the general statutory rule that nothing is allowed as taxed costs except what the statute provides, and where the statute makes no provision for solicitors' fees as part of the taxed costs.



# PHILIPPINE LAW

[Concluded]

By GEORGE A. MALCOLM

## SO-CALLED UNWRITTEN LAW.

*English and American Common Law.* What is common law? Chancellor Kent defines it as

"Those principles, usages and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declarations of the will of the legislature."<sup>71</sup>

But the term "common law" is used in many equivocal senses. Possibly we can do no better than to think of English and American common law as the whole body of law observed by English speaking countries as distinguished from Roman or civil law. In the United States the common law exists as such in the several states rather than as a body of federal common law.

For about eleven years the attorney-general and the courts of the Philippines had followed Anglo-American precedents in the nature of common law without apparently considering to what extent those authorities were binding.<sup>72</sup> In 1912 both the attorney-general and the Supreme Court on independent questions saw fit to lay down rules as to the weight to be given English and American common law in the Philippines.

In the case of *United States v. Cuna*,<sup>73</sup> the Supreme Court was called upon to decide whether the provisions of section 33 of act 1761 which in express terms repealed act 1461 should be construed so as to deprive the courts of jurisdiction after the date when the repealing act went into effect, to try, convict, and sentence persons guilty of violations of act 1461, committed prior to that date. There was no doubt that

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71. Kent, "Comm." 469. A definition of "common law" sanctioned by the United States Supreme Court is as follows: "As distinguished from law created by the enactment of legislatures, the common law comprises the body of these principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England." Black's "Law Dictionary," p. 332, quoted with approval in *Western Union Telegraph Co. v. Call Publishing Co.* (1901), 181 U. S. 92, 45 L. Ed. 765.

72. As in *U. S. v. Vallejo* (1908), 11 Phil. 193.

73. 12 Phil. 241 (1908). Followed in *Arnedo v. Llorente* (1911), 18 Phil. 257 and other cases.

"Under the general principles of the common law, the repeal of a penal statute operates as a remission of all penalties for violations of it committed before its repeal, and a release from prosecution therefor after said repeal, unless there be either a clause in the repealing statute, or a provision of some other statute, expressly authorizing such prosecution."<sup>74</sup>

But the Supreme Court declined to be bound by this rule, Mr. Justice Carson saying in his opinion that

"Neither English nor American common law is in force in these islands, nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law."

About the same time as has been said, Attorney-General Araneta made similar deductions, together with a further point that the common law as understood in the United States "has not by legislative enactment been adopted or made applicable in these islands."<sup>75</sup> The Attorney-General's view was as follows:

"We cannot say with certainty that the courts of the Philippine Islands will, in the absence of a statute, be guided by the common law. It has been said that the common law is expanded slowly and carefully by judicial decisions based on a standard of justice derived from the habits, customs, and thoughts of a people, and by this standard doubtful cases are determined; that the office of the judge is not to make the common law but to find it, and when it is found to affix to it his official mark by which it becomes more certainly known and authenticated. The announcement of the law comes from the courts after they have had the benefit of the learning of counsel, which to be comprehensive and useful must embrace a knowledge of the people and their customs as well as a knowledge of the principles established by prior decisions. It is, therefore, reasonable to assume that the courts of the Philippine Islands in cases not controlled by statute will lay down principles in keeping with the common law, unless the habits, customs, and thoughts of the people of these Islands are deemed to be so different from the habits, customs, and thoughts of the people of England and the United States that said principles may not be applied here."

Such conclusions find strong support in the historic and juridical facts relating to the adoption and application of the English common law in the United States. The courts of the United States unite in finding that the entire body of English common or unwritten law has been adopted and is in force in most of the states so far as applicable to their conditions and surroundings and not changed by statute, but no farther.<sup>76</sup> Moreover, it could have been added

74. *U. S. v. Reisinger* (1888), 128 U. S. 398, 401, 32 L. Ed. 480, quoted by court.

75. 4 Op. Atty. Gen. P. I. 510, 511. But see section 302, "Code of Civil Procedure," mentioning "the unwritten law."

76. *Van Ness v. Pacard* (1829), 2 Pet. 137, 7 L. Ed. 374; *U. S. v. Reid* (1851), 12 How. 361, 13 L. Ed. 1023; 8 Cyc. 377; see also as to common

that it is now a much modified common law, coming even to approach the exactness and symmetry of the civil law.

Critically contrasted with the doctrine established in the United States, our Supreme Court and the attorney-general appear in their quoted opinions to have stated the exceptions to the rule rather than the rule itself. Times without number American and English cases are cited and applied by the attorney-general and the insular courts. And this is inevitable when we remember the following: The United States Supreme Court has held that it is

"Settled that the guaranties which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands."<sup>77</sup>

So the great cases construing basic principles of republican government and constitutional rights have the same weight here as in the United States. Again, our Supreme Court, speaking through the same justice that wrote the *Cuna* opinion, in a later decision said that

"While it is true that the body of the common law as known to Anglo-American jurisprudence is not in force in these islands, nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing laws,<sup>78</sup> nevertheless many of the rules, principles, and doctrines of the common law have, to all intents and purposes, been imported into this jurisdiction, as a result of the enactment of new laws, and the organization and establishment of new institutions by the Congress of the United States or under its authority; for it will be found that many of these laws can only be construed and applied with the aid of the common law from which they are derived, and that to breathe the breath of life into many of the institutions introduced in these Islands under American sovereignty recourse must be had to the rules, principles, and doctrines of the common law under whose protecting aegis the prototypes of these institutions had their birth."<sup>79</sup>

The court but recently, citing the cases here mentioned, said:

"We have frequently held that, for the proper construction and application of the terms and provisions of legislative enactments which have been borrowed from or modeled upon Anglo-American precedents, it is

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law in the territories, *Mormon Church v. U. S.* (1890), 136 U. S. 1, 34 L. Ed. 478; 8 Cyc. 386, Note 22.

77. *Serra v. Mortiga* (1907), 204 U. S. 470, 474, 51 L. Ed. 571; 11 Phil. 762; *Kepler v. U. S.* (1904), 195 U. S. 100, 11 Phil. 669, etc.; and Philippine cases, as *Roa v. Collector of Customs* (1912), 23 Phil. 315, 339.

78. *U. S. v. Cuna*, 12 Phil. Rep. 241.

79. *Alawa v. Johnson* (1912), 21 Phil. 308, 331; 231 U. S. 106, 58 L. Ed. 142 (1913). In accord is the leading case of *Carter v. Commonwealth* (1899), 96 Va. 791, 45 L. R. A. 310.

proper and oftentimes essential to review the legislative history of such enactments and to find an authoritative guide for their interpretation and application in the decisions of American and English courts of last resort construing and applying similar legislation in those countries."<sup>80</sup>

Add to these decisions, what is necessarily true, that decisions of the United States Supreme Court are binding on Philippine courts;<sup>81</sup> set down the well-known principle of statutory construction that "when a statute is adopted from another state or country and such statute has previously been construed by the courts of such state or country, the statute is deemed, as a general rule, to have been adopted with the construction given to it;"<sup>82</sup> and call to mind that all Philippine remedial and political law, most of the commercial, and a goodly portion of the civil and criminal is of American origin, and there can not but be realized the far-reaching and even dominating influence of English and American common law over Philippine jurisprudence.<sup>83</sup> What Dean Fenner in an address delivered at the centennial anniversary of the organization of the Supreme Court of Louisiana said of that court "that in a very large proportion of the cases decided by this court the law to be applied is sought from the same sources and by the same methods as are resorted to in the common law states of the Union"—could be paraphrased for the Supreme Court of the Philippines. The Philippine Legislature may not have adopted the common law and technically the body of such law may not have effect, but practically speaking, no force of greater influence, not even excepting the codes, can be found in the every-day practice of the lawyer and the courts.

*Spanish Common Law.* It is difficult to define or describe the common law of Spain.<sup>84</sup> However, we find that both the civil code and the code of commerce jealously guard local customs and laws. In default of such customs and laws "the general principles

80. *U. S. v. De Gusman* (1915), XIII O. C. 1173, 1174. See also Arellano, C. J., in *Yankco v. Rhode* (1902), 1 Phil. 404; *U. S. v. Quinajon* (1915), XIII O. G. 1680; and similarly for Porto Rico *Diaz v. Porto Rico Railway Co.* (1914), 21 Porto Rico 73.

81. *Bryan Landon Co. v. American Bank* (1906), 7 Phil. 255; *U. S. v. Pico* (1911), 18 Phil. 386.

82. *Lewis' Sutherland* "Statutory Construction," p. 783; *Castle Bros., Wolf & Sons v. Co-Juno* (1906), 7 Phil. 144.

83. Just as the common law won victories in India, Canada, and other countries. See Sir Frederick Pollock, "The Expansion of the Common Law," pp. 16, 132-134, etc.

84. See *Escricho*, "Diccionario razonado de Legislacion y Jurisprudencia" title "Derecho comun;" *Walton's* "Civil Law in Spain and Spanish-America," pp. 110-115.

of law," the civil code provides can be applied by the tribunals.<sup>85</sup> The code of commerce in four articles recognizes "the common law."<sup>86</sup>

What is meant by "general principles of law" and "common law"? We need not linger to approximate exact definitions, although from the best consideration given the subject the phrase "general principles of law" as here used, seems to have signified the broad principles of justice, including natural law, scientific law, and the opinions of the jurists.<sup>87</sup> By *derecho comun*, (common

85. Art. 6. See also arts. 12, 13, 485, par. 2, 570, 571, 590, 591, 1555, par. 2, 1579, 1580, 1976 of the civil code. Art. 21 of the Louisiana Code provides: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." Dean *Fenner* adds: "It is clear that here is a recognition of the unwritten law in the broadest sense with a designation of the sources from which it is to be derived that are identical with those to which Common Law judges have resorted from the beginning"; "Address Centennial Anniversary of the Organization of the Supreme Court of Louisiana."

86. Arts. 2, 50, 310, 943.

87. 2 *Sanchez Roman*, "Derecho Civil," p. 100. *Sanchez Roman* approvingly cites *Valverde*, who says: "We think that the legislator proposes to give a greater extension and authority to this phrase. There are principles of justice that are higher than the contingency and variableness of facts; there are higher forms which serve as the foundation for positive law, whatever may be the course of development of the latter; there are rules, accepted by jurists, which constitute true axioms for him who takes part in juridical life, and which doubtless form a law higher than that laid down by the legislator, and it is to these principles, rules and forms that our legislator undoubtedly refers." 2 *Sanchez Roman*, "Derecho Civil," p. 102. *Arribas*, a Spanish civilian, believes that the phrase means "the fundamental principles of every law"; cited by *Sanchez Roman*, vol. 2, p. 102, note 1. *Manresa* hold substantially the same view. He says: "Whether or not the law accepts scientific law, the latter can never be prescribed. As a distinguished jurist says, 'science will always analyze, compare, and emphasize the relations of different provisions, reconcile contradictions, settle questions which the sense of the law offers; and juridical doctrine will be formed more or less rapidly, or more or less slowly, but by necessity it will establish a general criterion, will formulate or proclaim axioms of law, not only those which we might call traditional but also those which are recently worked out, according to the spirit that may filter into our institutions, and will govern juridical conscience with the same authority as the precept of the legislator. To ignore it is to show ignorance of what the life of the law really is. . . .';" 1 *Manresa*, *Comentarios al Código Civil*, p. 79.

Our Supreme Court has applied the words under consideration in two cases. In *The Heirs of Jumero v. Lizares* (1910), 17 Phil. 112, where the lower court, there being doubt as to the character of the contract under which the defendant held the land in litigation, decided in favor of the defendant, the Supreme Court, per *Arellano*, C. J., said on pages 115 and 116:

"As to the second assignment of error, it is true that the trial judge while in doubt, and by reason of his doubt, which existed after weighing the contradictory testimony, decided the suit in favor of the defendant. In so doing, he committed no error whatever, but, on the contrary, complied with the second paragraph of article 6 of the civil code, which provides:

"When there is no law exactly applicable to the point in contro-

law), was meant the law of Castille, including the *partidas* as distinguished from the *foral* law.<sup>88</sup> Further, in order that these general principles of law may be admitted as suppletory law, they must always be alleged.<sup>89</sup>

As to the weight in Spain given to the decisions of its highest tribunal, Sánchez Román would impress on the reader that under article six of the civil code authorizing the application of general principles of law, "judicial decisions can not be resorted to."<sup>90</sup> Yet this learned commentator admits that repeated decisions on the same point may be binding authority.<sup>91</sup> The general continental rule, inherited from Rome and even expressed in the codes, is that previous decisions are instructive but not authoritative.<sup>92</sup>

Even if a corruption of our section title, what is for us of interest is not to ascertain the exact meaning or force of the Spanish common law in Spain, but to know that the courts of the Philippines give to the decisions of the Supreme Court of Spain an added importance by citing and following these decisions. Other civil law jurisdictions, as France, Porto Rico, Cuba, and Louisiana are gone to for authorities, but the main reservoir is always Spain. Taking the last volume of Philippine Reports at hand (Volume 27), cases coming from the Supreme Court of Spain are cited by the Supreme Court of the Philippines twenty-five times. The first volume of Philippine Reports shows Spanish decisions cited sixty-three times, indicating a decline in use. In proportion, therefore, to American precedents, the influence of Spain is comparatively slight, and with a new penal code, will be still further diminished. Nevertheless, now and for a long time to come Spanish jurisprudence will be worthy of special notice.

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versy, the customs of the place shall be observed, and, in the absence thereof, the general principles of law.'

"And it is a general principle of law that, in case of doubt, the condition of him who possesses is the better one. The defendant in whose favor the doubt was decided is the possessor. See also *Urrutia & Co. v. Passig Steamer and Lighter Co.* (1912), 22 Phil. 330. The court through Torres, J., held that although compensation was not provided for by any law, yet it should be given, in accordance with the demands of 'strict justice.'"

88. 1 *Sánchez Roman*, p. 76; 1 *Blanco*, "Derecho Mercantil," pp. 341 and 342; see article 15, civil code. "The *partidas* is still the basis of Spanish common law, for the more recent compilations are chiefly founded on it, and cases which cannot be decided either by these compilations or by the local *fueros* must be decided by the provisions of the *partidas*." IV *Dunham*, "History of Spain," p. 109.

89. Decisions of the Supreme Court of Spain of October 16, 1894, and May 30, 1898; 1 *Manresa* "Comentarios al Código Civil," p. 81.

90. 2 *Derecho Civil*, pp. 79-81; also 1 *Manresa*, p. 80.

91. *Id.*, pp. 69-71. See also 1 *Amandi*, "Código Civil," p. 27 *et seq.*

92. See *Holland's "Jurisprudence,"* 11th Ed., pp. 68-70.

Of course the sovereignty of Spain in the Philippines having passed, the weight of the decision of its courts can not be of primary authority. The decisions of the Supreme Court of Spain are merely referred to by the Supreme Court of the Philippines for guidance. Just as in civil law countries the doctrine of precedents does not contain in its integrity, so a decision of the Supreme Court of Spain, as an opinion of a foreign jurisdiction, will be treated merely as persuasive authority.<sup>93</sup> The United States Supreme Court was recently asked to hold Spanish cases binding on facts coming from Porto Rico. It declined, Mr. Justice Holmes, saying:

"The Spanish decisions . . . have not the same effect as do those construing a statute subsequently copied by another state. They were rendered after Porto Rico had ceased to be subject to Spanish jurisdiction, and although entitled to great consideration, which no doubt they received, they do not preclude the local court from exercising an independent judgment. The construction adopted in Porto Rico at least does no violence to the words of the statute; it concerns local affairs under a system with which the court of the islands is called on constantly to deal, and we are not prepared, as against the weight properly attributed to the local decision, to say that it is wrong."<sup>94</sup>

*Customary Law.* It is not at all strange that with the Malay customary law so highly developed as it was in pre-Spanish times and with recognition of its existence by Spain, customs and usages should have persisted through the centuries even unto the present. These have varied in extent and weight in an inverse proportion to the vigor of Spanish or American control. Practically supreme until recently among the Moros, the Tagbanuas, and the Northern peoples, customs are even now controlling throughout the land to a degree not generally appreciated.

Since customs are handed down as tradition by word of mouth, since these vary with different regions, and since but rarely has anyone taken the pains to write them down, it is impossible to describe the nature of all such customs. The old men versed in the law, as the "Lalakai" of the Igorots, unfortunately employed no reporter of decisions, and volumes would be needed to encompass Philippine customary law due to its extensive ramifications. Fabian de la Paz in a thesis on customary law has written interestingly of the subject, under the heads of marriage, property, and obligations. But, as the learned Epifanio de los Santos says:

93. See *Black's "Law of Judicial Precedents,"* pp. 21 *et seq.*, 447 *et seq.*  
 94. *Cordova v. Folgueras* (1913), 227 U. S. 375, 57 L. Ed. 556; but see *Kealoha v. Casile* (1908), 210 U. S. 149, 52 L. Ed. 998, in which a construction given to a statute by the courts of Hawaii in 1890, before annexation, was followed.

"In the Philippines, whoever wants to know . . . the laws on testamentary succession, and the practice followed, in certain places, with reference to wills until the promulgation of the civil code, and even after that, will only have to open 'Parrocho de Indios' of Casimiro Diaz, and there he shall find the 'Practica de Testamentos' of Murillo Velarde, and thus he shall learn the ways in which a Filipino distributed his property. In such pamphlets as the 'Parrocho,' 'Confessionarios,' 'Catecismos,' prayer-books, which nobody reads at present, because perhaps it is more convenient to ignore them, one may unexpectedly, as we have said in another part, discover the customary law of the native, and the written and customary law of the colonizers imposed on the country, and the procedure or judicial practice, whether relating to ecclesiastical law, to the ordinary law, to the military law, or to the inquisition courts, and to other peculiarities of the judicial life of the country."<sup>95</sup>

At least we know that among the Moros, customs approximating the dignity of written codes exist. We know that among the peoples of the Mountain Province and elsewhere, there are extant rudimentary principles applicable to almost every possible situation. We know that customs can be found even within sight of the metropolis; and by comparison, we find that many present customs and usages are identical with those of the traditional age.

Philippine written law has lent recognition to customs. Article six of the civil code provides that "when there is no law exactly applicable to the point in controversy, the customs of the place shall be observed."<sup>96</sup> The code of commerce is somewhat to the same effect as to commercial transactions.<sup>97</sup> The organic act for Mindanao and Sulu takes cognizance of the customs of the Moros.<sup>98</sup>

The courts have considered the force of customs in a number of cases. How often the judges of the Mountain Province, of Mindanao and Sulu, of Palawan and of other places have modified judgments to plumb with local usage and law, it is impossible to say. The United States Supreme Court confirmed a title to land held in accordance with Igorot customs.<sup>99</sup> The Supreme Court of the Philippines examined and construed Moro customs and codes, but found itself not warranted in recognizing title to a tract of land as in a Moro *datto*.<sup>100</sup> The same court held that a tribal marriage ceremony will not be recognized as legal.<sup>101</sup> It said, in an opinion by Mr. Justice Torres, that:

95. "Biography of Ignacio Villamor," 1 Philippine Law Journal, Jan., 1915, p. 256.

96. See also articles of civil code cited under Spanish common law.

97. See especially art. 2.

98. Act 2520, sec. 3.

99. *Carino v. Insular Government* (1909), 212 U. S. 449, 53 L. Ed. 594.

100. *Cacho v. Government of the United States* (1914), 28 Phil. 616.

101. *U. S. v. Tubban* (1915), XIII C. G. 425.



"A contract for services or work to be performed exists not only where a certain and definite compensation has been expressly agreed upon, but also where the same can be ascertained from the customs and usages of the place in which such services were rendered."<sup>102</sup>

And in reversing a judgment because it did not take into account a universal practice, the Court, through Mr. Justice Moreland, spoke of "the sanction of the strongest of all civil forces, the customs of a people."<sup>103</sup>

Such is the general situation of Philippine customary law as viewed by the written law and by the courts. In addition, there can be little doubt that as occasion requires, the courts will apply well-established definitions and principles.

*Mohammedan Law.*<sup>104</sup> The original act providing for the organization and government of the Moro province attempted to have the Moro customary laws collected, codified, and revised.<sup>105</sup> These

102. *Smith v. Lopez* (1905), 5 Phil. 78, 82; see also *Lichauco v. Armstrong* (1910), 17 Phil. 39; *Urrutia & Co. v. Pasig Steamer and Lighter Co.* (1912), 22 Phil. 330.

103. *Martinez v. Van Buskirk* (1910), 18 Phil. 79.

104. See generally *Najeeb M. Saleeby*, "Studies in Moro History, Law, and Religion," Ch. II, giving English translations of "the best official codes of Magindanao and Sulu"; *Charles S. Lobingier*, "The Legal Influence of Islam in the Philippines," a lecture before the Philippine Academy and the law students of the University of the Philippines; same author in *XXI Law Quarterly Review*, Oct. 1905, pp. 405, 406; Report of *General Wood*, Sept. 9, 1904. The author has also received the benefit of a communication on the subject from Dr. Saleeby.

105. Act 787, sec. 13 (j), effective July 1, 1903, reading as follows: "To enact laws which shall collect and codify the customary laws of the Moros as they now obtain and are enforced in the various parts of the Moro Province among the Moros, modifying such laws as the legislative council think best and amending them as they may be inconsistent with the provisions of the act of Congress entitled 'an act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' and to provide for the printing of such codification, when completed, in English, Arabic, or the local Moro dialects, as may be deemed wise. The Moro customary laws thus amended and codified shall apply in all civil and criminal actions between Moros. In all civil and criminal actions arising between members of the same non-Christian tribe other than Moros, unless otherwise provided by the legislative council, the customary laws of such non-Christian tribe, if consistent with the act of Congress above mentioned and if defined and well understood, shall govern the decision of the cause arising, but if there be no well-defined customary laws or they are in conflict with such act of Congress, then the cases shall be determined by the criminal or civil code according to the laws of the Philippine Islands until the legislative council shall make other provision. In actions, civil or criminal, arising between a Moro and a Christian Filipino, or an American or a subject or a citizen of a foreign country, the criminal code and the substantive civil law of the Philippine Islands shall apply and be enforced."

Thus following the example of the British, Dutch, and French governments. *R. K. Wilson*, "Digest of Anglo-Mohammedan Law;" *Reinsch*, "Colonial Government," Ch. XVII. The statute 21 Geo. III, c. 70, sect. 17, in declaring the powers of the Supreme Court of Calcutta, provides that

laws were then to apply to all actions arising between Moros. Shortly thereafter, on recommendation of the government of the Moro Province,<sup>106</sup> the Philippine Commission repealed the provisions for codification, and instead, authorized the legislative council of the Moro Province to modify Philippine law to suit local conditions among the Moros and other non-Christian inhabitants of the Province.<sup>107</sup> Such amended laws were to conform when practicable to local customs and usages. Recently, when the legislative council was abolished, the Philippine Commission provided that

"Judges of the court of first instance and justices of the peace deciding civil cases in which the parties are Mohammedans or pagans, when such action is deemed wise, may modify the application of the law of the Philippine Islands, except laws of the United States applicable to the Philippine Islands, taking into account local laws and customs: *Provided*, That such modification shall not be in conflict with the basic principles of the laws of the United States of America"<sup>108</sup>

The standing given to Mohammedan law in the Philippines is thus seen. It may not change the complexion of the Philippine legal system permanently. At least for some time to come Mohammedan laws and customs will have to be examined and considered in cases arising in the Moro country and will constitute the basis for settling civil differences outside the courts.

The Koran is, of course, for the Mohammedan the sacred law book, but there is very little strictly legislative matter scattered through it.<sup>109</sup> The Moros further accept all Mohammedan law.

"inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mohammedans by the laws and usages of Mohammedans, and in the case of Gentús by the laws and usages of Gentús, and when only one of the parties shall be Mohammedan or Gentú, by the laws and usages of the defendant. Similar provisions with reference to the courts at Madras and Bombay are contained in 37 Geo. III, c. 142.

106. "It was found that the customary laws of the Moros and non-Christians were either non-existent or so vague and whimsical as to be impracticable of administration in courts of justice. The legislative council reached the conclusion that it would be better to apply, with some modifications to suit local conditions, the general laws of the Philippine Islands to these people." Report of the Acting Governor of the Moro Province, July 10, 1905, Report of the Philippine Commission, Part I, 1905, p. 330. See also *Cacho v. The Government of the U. S.* (1914), 28 Phil. 616.

107. Act 1283, sec. 6 (b), effective Feb. 1, 1905. But an opinion of the attorney-general virtually nullified this subsection. 4 Op. Atty. Gen. P. I., 472. Pursuant to act 1283, act 114 was enacted by the legislative council and amended and approved by the Philippine Commission on Sept. 4, 1905. The idea is somewhat the same as adopted by the United States for the Indians. See *U. S. v. Kagama* (1886), 118 U. S. 375, 30 L. Ed. 228.

108. Act 2520, sec. 3, effective April 3, 1915.

109. R. K. Wilson, "Digest of Anglo-Mohammedan Law," p. 9.

The laws of most general application among the Moros of Mindanao are found in a code known as "Luwaran" (selection); brought to the island by the Mohammedan conquerors and modified to suit local conditions. The most reliable and scholarly author on Moro history and law in the Philippines, Dr. Najeeb M. Saleeby, a prominent Manila physician, gives an English translation from the Arabic of "the Luwaran, the Magindanao Code of Laws."<sup>110</sup> He says of it generally:

"The term 'Luwaran,' which the Mindanao Moros apply to their code of law, means 'selection' or 'selected.' The laws that are embodied in the Luwaran are selections from old Arabic law and were translated and compiled for the guidance and information of the Mindanao 'datus,' judges, and 'pandita' who do not understand Arabic. The Mindanao copies of the Luwaran gives no dates at all, and nobody seems to know when this code was made. . . . The Arabic books quoted in the Luwaran are 'Minhaju-l-Arifeen,' 'Tagreebu-l-Intifa,' 'Fathu-l-Oareeb,' and 'Miratu-t-Tullab.' The first of these, generally known as the 'Minhaj' is the chief authority quoted. . . . The compilation of the Luwaran must have been made before the middle of the eighteenth century. In making the Luwaran the Mindanao judges selected such laws as in their judgment suited the conditions and the requirements of order in Mindanao. They used the Arabic text as a basis, but constructed their articles in a concrete form, embodying genuine examples and incidents of common occurrence in Mindanao. In some places they modified the sense of the Arabic so much as to make it agree with the prevailing custom of their country. In a few instances they made new articles which do not exist in Arabic but which conform to the national customs and common practices. The authority of the Luwaran is universally accepted in Mindanao and is held sacred next to that of the Kořan. The Mindanao judge is at liberty to use either of them as his authority for the sentence to be rendered, but as a rule a quotation from the Koran bearing on the subject is desirable."<sup>111</sup>

The Luwaran treats of both substantive and procedural law. Family relations, property, commercial intercourse, evidence, and criminal offenses are some of the subjects receiving most attention. The penalties are usually payment of fines. Quotations in Arabic appear as marginal notes.<sup>112</sup> The Luwaran is valuable not alone for its contents but as pointing the course to be followed in relations with the Moros.

The Mohammedans of the Sulu Archipelago have likewise developed successively several codes. The present principal Sulu

110. Given in Saleeby, "Studies in Moro History, Law, and Religion," pp. 66-88.

111. Saleeby, "Studies in Moro History, Law, and Religion," pp. 64, 65. The Luwaran is construed by the Supreme Court of the Philippines in *Cacho v. Government of the U. S.* (1914), 28 Phil. 616.

112. English translations given by Saleeby, id., pp. 82-89.

code is translated by Dr. Saleeby.<sup>113</sup> He also tells of a new Sulu code, a rearrangement of the old one, but not generally adopted.<sup>114</sup>

As to compliance with the Moro codes, Dr. Saleeby states:

"In actual practice the Moros do not distinguish between custom and law. Many of their customs are given the force of law, and many laws are set aside on account of contradiction to the prevailing customs of the day.

"The Moros are not strict nor just in the execution of the law. The laws relating to murder, adultery, and inheritance are seldom strictly complied with. Indeed, the laws of inheritance as given in the Luwaran are generally disregarded and are seldom considered at all. Mohammedan law does not recognize classes, except the slave class. But Moro law is not applied equally to all classes. Great preference is shown the datu class, and little consideration is given to the children of concubines.

"The Luwaran, nevertheless, is the recognized law of the land and compliance with it is a virtue."<sup>115</sup>

*Case Law.* The courts would probably indignantly reject the imputation that they make law. Frequently has our Supreme Court vigorously asserted that it should not and would not put on the mantle of the legislature. Bentham's "judge-made law" it condemns.<sup>116</sup> Yet the courts here as elsewhere do mould and expand the law by their decisions. They breathe life into dead law. They impel to legislative action to cure defects. Authoritative interpretation of the written law by the courts acquires the force of law.

The courts of first instance dividing the Philippines into twenty-six judicial districts are courts of record. Unfortunately, no effort is made to publish the opinions of the judges and only occasionally and then on private initiative do their decisions reach the public. The only way by which uniformity is attained under such conditions is by circulars of the secretary of finance and justice and through the judgments of the Supreme Court harmonizing on appeal various inconsistent applications of the law by the several judges of first instance. Moreover, the judges of all inferior courts are bound to accept and follow the decisions of the Supreme Court of the Philippines implicitly.

113. Given in *Saleeby*, id., pp. 89-94.

114. Translations given by *Saleeby*, id., pp. 94-100.

115. *Saleeby*, "Studies in Moro History, Law, and Religion," pp. 65, 66.

116. See *Gomez v. Hipolito* (1903), 2 Phil. 732, Johnson, J., dissenting, and *Lamb v. Phipps* (1912), 22 Phil. 456, Trent, J., dissenting p. 558.

Lord Esher, M. R., says: "There is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable." *Willis v. Baddeley* (1892), 2 Q. B. (C. A.) 324, 326. Another court has said: "This power of

The Supreme Court of the Philippines has published thirty volumes of reports in both English and Spanish. Due to the freedom of appeal, its revision of all death sentences, its reviews of the evidence, its right to declare statutes invalid, its exclusive jurisdiction, and the grave questions which the institution of a new government and the blending of different systems of law presented, the opinions of the Supreme Court are of unusually great importance. Having to break new ground, the Supreme Court could, in initial decisions, keep itself free from hide-bound precedent, and could consider the reason of the law rather than the letter. A studious effort is badly apparent to discourage prolonged litigation and finally to dispose of cases if any equitable construction of the pleadings will so permit.<sup>117</sup>

The court takes the stand to give testimony in its own behalf as follows:

"The Supreme Court of the Philippine Islands annually disposes of some eight hundred cases, about equally divided between the civil and the criminal dockets, in some five hundred of which written opinions are filed. In addition, an exceptionally large number of motions and incidental matters are disposed of in minute orders; the exceptionally large number of matters of this nature being due, in part at least, to the adoption in this jurisdiction of an American procedural system, without any substantial modification of the substantive law of the islands as found in the codes of Spain. It is believed that a comparison of these figures with those

construction in courts is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the state. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice Pemberton, one of the judges of the despot Charles II, and not the worst even of those times, that he had entirely outdone the parliament in making law. We think that system of jurisprudence best and safest which controls most by fixed rules, and leaves least to the discretion of the judge; a doctrine constituting one of the points of superiority in the common law over that system which has been administered in France, where authorities had no force, and the law of each case was what the judge of the case saw fit to make it. We admit that the exercise of an unlimited discretion may, in a particular instance, be attended with a salutary result; still history informs us that it has often been the case that the arbitrary discretion of a judge was the law of a tyrant, and warns us that it may be so again." Perkins, J. in *Spencer v. State* (1854), 5 Ind. 41, 46. Most modern writers agree with the criticism of Austin, upon what he describes as "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody; existing from eternity, and merely declared, from time to time, by the judges." Lectures, ii, p. 655; Holland, "Elements of Jurisprudence," 11th Ed., pp. 65, 66, note.

117. See for example *Rabes v. Atlantic Gulf and Pacific Co.* (1907), 7 Phil. 359; *Manila Railroad Co. v. Attorney-General* (1911), 20 Phil. 523; *Lisarraga Hermanos v. Yap Tico* (1913), 24 Phil. 504, 513.

of the half-hundred courts of last resort in the United States will disclose that the volume of the output of this court, as a whole and per capita of its membership, places it well within the rank of the first half-dozen of those courts in this regard. (See the reporters generally and data assembled by the West Publishing Company and published in the Docket).

"Furthermore, it is to be remembered that in disposing of this large volume of business, this court, unlike the appellate courts of the United States generally, is required, in all criminal cases and in ninety per cent of the civil cases, to review the evidence (which is not required by law to be printed and comes up in the original transcript of the stenographer's notes) so as to ascertain whether the judgments of the lower courts are 'sustained by the weight of the evidence.'"<sup>118</sup>

The salutary effect of uniformity, certainty, and stability in the law will be attained here as elsewhere under American sovereignty by adherence to the rule of *stare decisis*.<sup>119</sup> The Supreme Court would undoubtedly not feel itself bound by obiter dicta to be found in previous opinions. As Mr. Chief Justice Marshall once said:

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."<sup>120</sup>

The Supreme Court does, however, suggest rulings to guide a new trial.

Cases taken to the United States Supreme Court on appeal or writ of error become substantially a part of the Philippine case law. These opinions, while few in number, have been epochal in effect.

*Legal Treatises.* One can find the names of the leading Spanish commentators and of well-known American text writers mentioned frequently in the Philippine reports and the opinions of the attorney-general. The respect accorded the views of Manrosa and Viada, of Cooley, and of Dillon, and others, and their commanding influence on decisions is noteworthy. In any number of cases their opinions have been accepted without argument, as decisive. One can search in vain for a writer of Philippine origin cited as an authority.

118. *Alsea v. Johnson* (1912), 21 Phil. 308, 395.

119. *Kuensle & Streiff v. Collector of Customs* (1908), 12 Phil. 117; and *Black* on "Interpretation of Laws," p. 18; but see *McGirr v. Hamilton* (1915), XIII O. G. 878, holding that where a question passes the court sub silentio, the case in which the question is so passed is not binding on the court.

120. *Cohens v. Virginia* (1821), 6 Wheat. 264, 398, 5 L. Ed. 257.

It is true there are good books by Philippine authors. Ignacio Villamor has written a scholarly "Tratado de Elecciones"; Manuel Ramirez, "Manual de Derecho Civil"; Charles S. Lobingier on "Philippine Practice"; Theodore M. Kalaw, "Teorias Constitucionales"; F. R. Feria, Manuals on "Criminal Procedure" and for notaries public and justices of the peace; Mariano H. de Joya, "Principios de Derecho Internacional Privado"; and there are others. Such volumes were intended as elementary text books for students or for particular classes. They were not prepared to advocate reforms and accordingly have not caused radical changes in statute law. Neither were they of such an original nature as to be incorporated in the Reports.

The field of Philippine forensic literature is a virgin one awaiting the first furrow by the pioneer plowman.

# LAW REFORM

BY EDWARD ROBESON TAYLOR<sup>1</sup>

For many years the air has been filled with the voice of law reform and of recent years that voice has grown quite vociferous. Yet, little has been done in the way of true reform, except it may be said that some true reform was made through what was known as the reform procedure. That which permitted equitable defences to be pleaded in common law actions and which permitted in certain cases the rights of parties to be administered notwithstanding the form in which the action had been brought, were indeed real advances; but still they fall far short of that which is fundamental, and which I here bring forward more to invite discussion than to present an exhaustive view of what I deem to be demanded; for the defects of our system (or no system) lie in the field of the substantive and not of the adjective law. And this being so, how is it possible to make the substantive law what it ought to be by amending the adjective law? We have, in fact, a condition of things which is a reproach to us and which it is quite remarkable that civilized human beings should submit to. We have, instead of one system of rights, which it might be supposed would be enough, and which satisfied the Romans in the flower of their jurisprudence, two well defined systems of rights, which in many respects are entirely different from each other.

Let us be somewhat specific, and, firstly, let us ponder the way the law deals with consideration and the way equity deals with it. In the law, any consideration is supposed to be sufficient to support a contract; indeed, to use the language of Professor O. K. McMur-ray, recently used by him at the meeting of the Association of American Law Schools, at Chicago, Illinois, it is, as gathered from the case books, "a necessary, an indispensable, and an immutable principle" in law; though, as he claims, there are revolutionary workings which are making or tending to make it "moribund." On the contrary, equity treats consideration in an entirely different way. If a man brings a suit to enforce his contract of purchase, say, of land, he must allege, and in fact prove, according to our Supreme Court, in addition to the other things which it is not necessary to mention here, full value of the land. In fact, in no jurisdiction, I apprehend, that follows our law, would consideration be substantially treated otherwise.

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Let us take the case of a contract between a partnership and a corporation, where a member of the partnership, who has promoted the contract, is one of the directors of the corporation. Here, at law, there is a perfect contract, but equity will deem it to be bad; for virtually there are not juristic persons on both sides of the contract, but only one person.

Again, take the case of independent advice. The contract between husband and wife for settlement of the common property is perfectly good in the absence of actual fraud and duress, and sustainable at law; but if the wife had not had independent advice she can at her own instance have the contract set aside.

We have a statute providing for set-off, but we know that set-off is entirely of equitable origin, and that notwithstanding the statute a set-off will be allowed in equity if the equity is shown to be one outside of the statute; and, in fact, the same may be said of contribution.

At law, the sale of an expectant interest is void, but if the sale be made on sufficient consideration, or if money be lent on it, it will be supported in equity. Again, the doctrines of equitable conversion, of fraud, of accident, and of mistake are so different from what we find in the law as of themselves to constitute, as contradistinguished from the law, something entirely novel. It is not necessary to pursue this subject, for confessedly equity took its origin and has added to its magnificent bulk by reason of the deficiencies in the law, so that we have a system of equity which is the great glory of the country in which it grew up. Indeed, in my own opinion, nearly the greatest injury ever inflicted upon England was that injury which resulted from the course of justice not pursuing the same evolution as in ancient Rome. It might have done so, as Pomeroy points out, had the statute of second of Westminster (*in consimili casu*) been liberally followed and not inhospitably treated by the judges.

The Romans had a most illuminative legal vision. They saw when they began to be great that their law, built on the customs of barbarians and farmers, could hardly be sufficient to govern the rights of the civilized peoples who bordered the Mediterranean and whom they were subduing to their empire. And they had the sense to realize that a people who had two systems of rights had in reality no system, and so it was that they let go of their *corpus civilis* and built on the wide extended basis which supports at present all the legal systems of the world except those of this country and England with her colonies.

In our state of California, which is certainly one that houses all that is best of human nature, is it not strange enough that such a condition of things should exist? That it has been held over and over that you cannot have any remedy in equity, if there is a remedy at law; that that which governed the issuance of the first subpoena more than eight hundred years ago should dominate us with the same imperious force; that a law which confessedly deals with the "substance" of things should be put under the heel of a law which confessedly deals with the "form" of things; that the superior must yield to the inferior—are we not warranted at wondering at such a state of things? The fact that the doctrine of consideration is, as Professor McMurray says it is, becoming "moribund," is a fact to illustrate the point of the great separation between law and equity, and how judges are willing even at the expense of being revolutionary to try and bring them together.

Here, I take it, lies the future of real reform in the law. Even now there are some states in the American union which have separate courts of law and of equity—one court administering one system of rights and another court administering another system of rights. If this were not the most serious of matters, it would indeed be laughter for the gods. And those courts which do not have separate courts still keep the systems of equity and law entirely different in substance, though uniting in practice.

It is really astonishing how the past controls us, and controls us to our great injury. What an absurd thing it seems to a thinking person that there can be no remedy in equity if there is one at law, particularly when we consider how this arose. The king, as we know, being deemed to be the fountain of justice, and no court having jurisdiction to try a case in the absence of his writ giving it right to do so, it was obvious, under such a state of things, that the remedies at law were exclusive and that you could not resort to any tribunal if a writ could not be found by the clerk having the copies of all writs in his possession. Hence there was no remedy in equity, if a remedy could be found at law, and such rule has prevailed universally in all the states of the United States having common law jurisdiction. In my own state, California, this has been from the first, and still is, an inexorable rule, and rests on no reason except that given above. These chains which were forged for us in the days of feudalism we still wear, and as we go along, their clank resounding in our ears, we rejoice that things are as they are and that such an anomaly is one of the great benefits of our law. We are happily told that law is of the form (as indeed it is) and

that equity is of the substance. Equity must be very far superior to law, as the substance of things must be very far superior to their form, and yet by the rule we are commanded to resort to the inferior thing, if it furnishes what seems to be an adequate remedy, rather than to the superior thing. But that we should have as the basis of rights a superior and inferior really makes our system of rights seem to be the product of uncivilized people. Into what confusion, we fell, when we were compelled to treat the mortgage in one way from the law point of view and in an entirely different way from the equity point of view, as was done in England for centuries and is doubtless still done there and in some other jurisdictions, and all this confusion on so simple a matter as borrowing money on real property security.

Why law, nearly the sole product of custom, with all its crudities and defects, should still hold its own, is indeed a marvel. Rome had a much greater reason for holding to it than we have, but when her subjects all became citizens the *corpus civilis* did not long survive and was swallowed up in that great system of equity which the praetors, during the centuries of their power, had brought into being. And so Rome, the mighty, that dominated the whole civilized world with her arms, now dominates that same world with her laws.

It is not a sufficient answer to what is urged here that the present condition has lasted so long a time that it is too late to change it. On the contrary, from time to time, great changes have been made, notably in England, in 1873, when the Judicature Act was passed. In that instance it was a great pity that the reformers fell short of all that they ought to have done, and they will again have to go forward. A great change was made when the reformed procedure was adopted by the states which adopted it. Still, the demand for reform is greater now than ever before, and nothing is here urged that cannot with perfect safety be done. That we should have but *one* system of rights goes without saying; that we *can* have but one system depends entirely upon ourselves.

# THE MACHINERY OF JUSTICE: A STUDY OF COURTS

BY JOSEPH J. THOMPSON<sup>1</sup>

## I. THE COURT PROBLEM

In the ceaseless quest for a means of administering justice satisfactorily amongst themselves, men of every nation have experimented with numerous and varying agencies.

That there seems to be no one absolutely right system is evidenced by the fact that amongst the hundreds of court systems in vogue throughout civilization, it is believed that there are no two that are in accord in the greater number of their features.

Whatever the judgment of the past was, it is now plainly the conviction of practical men that substance as distinguished from form, and results rather than methods are of prime importance in the administration of justice, and the inquiry of today is, "How can justice be arrived at most easily, speedily and satisfactorily?" And, as the courts are the instrumentalities or machinery of justice, that inquiry must be answered in the organization and operation of the courts.

Though the courts of different states and nations are generally, especially in reference to details, unlike, there are similarities amongst them which make it possible, roughly at least, to classify them. Admitting that the classification here attempted is largely arbitrary, but claiming for it convenience, courts may be regarded as: 1, bench courts; 2, bar courts; 3, unorganized courts; 4, unified courts.

A brief reference will indicate the thought responsible for this classification.

1. The courts of Germany are properly "bench courts." So far have the Germans gone in the direction of making the judge the responsible part of the machinery of the court that attorneys might virtually be dispensed with.

2. The English courts have proceeded far in the other direction, virtually permitting the administration of justice to be influenced by the standing of the counsel or barrister.

3. Most of our American state courts are shining examples of the third class, unorganized courts. It has been a habit of legis-

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1. Of the Illinois Legislative Reference Bureau, Springfield, and Commissioner for the Uniformity of Laws in the Several States.

latures to patch up our court system, adding a new court or conferring new jurisdiction whenever a new subject of litigation pressed itself with some force upon the community.<sup>2</sup> These courts bear only a hit-and-miss relation to each other and are frequently extremely weak in themselves.

4. In the last classification, which is not fully expressive of what students of the subject understand as "efficient courts," fall but a very few of the courts of the world. Examples of unified courts, not, of course, fully developed, are found in the Supreme Court of Judicature of England, the courts of Ontario, of California, and, to an extent, of New York, New Jersey, Delaware, and Michigan under the new judicature act.

Plainly, a system of courts is needed that will enable persons resorting to them or being brought into them to obtain the highest form of justice practicable, with as little delay as possible, and without disproportionate burdens either of effort or expense.

To this end it seems proper that both the bench and the bar should be required to give their best efforts and assume the whole responsibility of their respective positions, and that the organization and procedure be such as to eliminate all waste of time, motion, energy, and expense.

## II. DEFECTS OF THE PRESENT COURT SYSTEM AND SUGGESTED REMEDIES

(a) *Number of Courts.* The courts are too numerous. Any system by which the citizen may be required to apply to several different courts to secure full and final adjustment of any legal matter is defective.

A satisfactory system of courts would enable the citizen to apply at a single place for the adjustment of any law matter within his requirements. There seems to be no good reason why one court in any county could not care for any matter of law arising within that county. The reason for creating distinct offices and departments for circuit, county, city, and probate courts is apparent neither in the theory upon which they are created nor in the results which they achieve.<sup>3</sup>

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2. When a new type of cause arises, the method of archaic law is to set up a new court \* \* \* in a time when unification is sorely needed we go on making new courts. Intermediate appellate courts are still being interposed between trial and final review and municipal courts are still being added at the bottom": *Roscoe Pound*, "Organization of Courts," address to Minnesota State Bar Association, St. Paul, Aug. 20, 1914.

3. "The whole judicial power of each state \* \* \* should be vested in one great court, of which all tribunals should be branches, departments, or

It seems proper to consider our circuit court system, under which several counties are formed into a district, as a preliminary measure applicable only while single counties are too small to sustain or justify courts of their own.

The ideal system under the present state of our population and advancement would seem to be a single court for each county (with a saving provision with respect to small counties that might be joined), with as many judges as shall from time to time become necessary, and a sufficiently elastic system of designation or distribution of the business to secure the best results.<sup>4</sup>

The constitution should be so amended as to enable the legislature to abolish justices of the peace and police magistrates in any or all districts or counties. The small litigant deserves just as good a judge as the large one. Under the Ontario system the best trial judges are available for the trial of small claims and suits, and are even required to hold court at intervals in outlying villages further to facilitate business.

(b) *Inelastic Forms.* The lines are drawn too rigidly between various forms of actions and proceedings. Any system of jurisprudence that prevents a court from administering speedy and complete justice is an impediment to the administration of justice. Our more or less rigid practice concerning different forms of actions and our radical distinctions between "law" and "equity" present real obstacles.

Courts should have but one end in view—the doing of justice—and to that end distinctions with respect to forms or as to the char-

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divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public": *Roscoe Pound* in report to American Bar Association, 1908.

"Still another form of waste is the treatment of controversies piecemeal, one part in one court or proceeding and part in another, with no power to refer all the proceedings to one court, although both are set up to the same end.

"For example, it has been observed that in almost any of our cities today, at one and the same time, the Juvenile Court, passing on the delinquent children, a court of equity, entertaining a suit for divorce, alimony and the custody of children, a court of law, entertaining an action for necessities furnished an abandoned wife by a grocer, and the criminal court or domestic relations court, in a prosecution for desertion of wife and child, may all be dealing piecemeal at the same time with different phases of the same difficulties of the same family. The remedy lies in organization of judicial business."—*Ib.*

4. Sec. 6, art. VI, Const., California. See also courts of Ontario, Delaware, New Jersey, and New York.

"A court (consisting of all the judges in the county) of 58 judges should be given full jurisdiction over every sort of case and then separated for the

acter of actions should be held lightly. As a matter of convenience in classification it may be proper to retain all or at least many of such distinctions and to require that practice shall conform thereto, but to allow a liberal system of amendments for that purpose, and to empower all courts to grant any relief that any party litigant would be entitled to at law or in equity or under any form of action or procedure in any court where a cause may be pending or to which it might be transferred.<sup>5</sup>

Flagrant abuses which have grown out of the distinction between law and equity under which the expense of chancery pro-

purely practical purpose of despatching business into at least five divisions."

\* \* \* The judges holding places in these divisions should be to a certain extent protected in the occupation of their positions, but all should have power to sit in any other division if the exigencies of business required it.

"\* \* \* Each division should have at its head a presiding justice who should be responsible for the way in which the docket for that division was being despatched. Over all there should be a single executive in a chief justice": *Kales*, in *ILLINOIS LAW REVIEW*, Oct., 1912.

"Effective administration of justice in the urban communities of today requires a unification of the judicial system whereby the whole judicial power of the state shall be vested in one organization of which all tribunals shall be branches or departments or divisions": "Preliminary report on efficiency in the administration of justice," by *Eliot, Brandeis, Storey, Rodenbeck*, and *Pound*.

"To achieve the end of specialist judges rather than specialized courts, the entire judicial power should be committed to one court. This court should be constituted in three chief branches:

(1) County courts or municipal courts; (2) a superior court of first instance; and (3) a single ultimate court of appeal. The first should have exclusive jurisdiction of all petty causes. There should not be a separate judge for each locality. Instead all the courts with petty jurisdiction should in the aggregate constitute one court, or a branch of the great court, but this branch of the court should have numerous local offices where papers may be filed, and as many places for hearing causes in each county as the exigencies of business may require. These should not be determined absolutely in advance by legislation. To a large extent they should be left to the chief justice, or to a committee on rules, to be fixed by rules of court from time to time as experience indicates where sittings of the court may be had with most advantage to the conduct of business and convenience of litigants." *Roscoe Pound* before Minnesota State Bar Association.

5. Const. Idaho, sec. 1, art. V; Mont., sec. 28, art. VIII; Nevada, sec. 14, art. VI; North Carolina, sec. 1, art. VI; Miss., sec. 147, art. VI.

The English Judicature Act provides that any one of the courts shall give the same equitable relief to any party as was formerly available in chancery, and that the courts shall grant either absolutely or upon terms all such legal or equitable remedies as the parties may appear entitled to so that all matters may be completely and finally determined and multiplicity of legal proceedings avoided.

"One thing is practicable and that is to abolish limitations upon the jurisdiction of courts, giving one tribunal power to adjudicate all cases at law or equity. This does not result in a confusion of court business. \* \* \* When such a consolidation is made both legal and equitable questions and issues may properly be raised in the same proceeding, and legal and equitable rights and defenses may be set forth in the same pleadings and legal and equitable remedies may be administered through the same judgment": *Edson R. Sunderland* in *Michigan Law Review*: "The Michigan Judicature Act."

ceedings have become unbearable ought to be cured. There is no reason why the heavy costs of litigation in chancery cases should be wholly borne by the parties, while at law the costs are shared by the state.

Masters in chancery should be judges, or at least should possess certain judicial powers, or there should be no masters and more judges, if necessary.<sup>6</sup>

(c) *Rules of Evidence.* The reasons for the exclusion of evidence formerly recognized have in many cases ceased to exist and the application of rules formulated under the influence of such reasons frequently results in the inability to get before the court the facts in a case. It is fully as bad to be obliged to decide a case without hearing all the facts therein as to be obliged to pass upon it with false or perjured testimony before the court.

Neither judge nor jury can have a complete understanding of a cause without knowing all the facts relating thereto, and the more complete their knowledge of the facts, the better qualified will they be to determine the cause. The ideal court, therefore, should not be hampered by rules of evidence that will prevent the presentation of all the known facts. Such rules of evidence, for example, as prevent persons in interest, husbands, wives, parties to suits, etc., from testifying, and such as prevent persons interested in the outcome of suits by or against the representatives of deceased persons, should all be abrogated. Every one with actual knowledge of the facts should be permitted to testify thereto, the weight of the testimony being modified by self-interest and any other proper consideration shown.<sup>7</sup>

(d) *Supervision.* Our courts at the present time are practically without authoritative supervision, each judge or each branch being virtually a law unto himself or itself. The attempt at securing uniformity being embodied in laws deprives the court system of all elasticity and tends to prevent, retard or cripple the administration of justice.

An authoritative supervisory power over courts, especially of inferior jurisdiction, should be lodged somewhere and should be effective in promoting the administration of justice.<sup>8</sup> No depart-

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6. See as to disadvantages of the system of masters in chancery: "A comparative study of the English and the Cook County Judicial Establishments," by *Albert M. Kales* in *ILLINOIS LAW REVIEW* for December, 1909.

7. *Wigmore*, "Evidence," Vol. I, Sec. 578; Vol. II, Sec. 1576; Vol. III, Sec. 2065.

8. Const. Ark., sec. 4, art. VII; Colo., sec. 2, art. VI; Iowa, sec. 4, art. V; Mich., sec. 4, art. VIII; Mo., sec. 3, art. VI; Mont., sec. 2, art. VIII;



ment of government can succeed uniformly without some person or place of final authority. Just as the governor is the officer of last resort in administrative affairs, the chief justice, our highest court officer of the state, could be made the officer of final resort in all administrative matters of the courts; and as each separate department in the state's administrative government, though inferior and subordinate, has its head, so each court should have a head or officer of final resort, who naturally might be a chief or senior judge. The formulation and enforcement of rules of practice and procedure should be entrusted to such chief or senior judges, together with such others associated with them as should seem from time to time to be expedient; and the law should provide sufficient leeway that the rules and regulations might from time to time be altered so as to secure the best results.<sup>9</sup>

(e) *Appeals*. The system and method of appeal is too burdensome. In order to secure justice it is frequently necessary to appeal cases simply because they have not been decided upon the merits by reason of an erroneous notion of an inferior court with respect to practice, procedure, or some point without merit in determining the justice of the case. It is, besides, entirely too expensive and too circuitous to be obliged to take a decision of a single judge or justice into a separate court, remove the record and re-try the case.

A practical method of appeals is here suggested. In counties where there are several judges of a single court (the only present

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N. Dak., sec. 86; New Mexico, sec. 3, art. VI; Oklahoma, sec. 2, art. VII; S. Dak., sec. 2, art. V; Wis., sec. 3, art. VII; Wyo., sec. 2, art. V; Maryland, sec. 18, art. V. See argument in "A Comparative Study of the English and the Cook County Judicial Establishments," by *Albert M. Kales*.

"Some one high official of the court should be charged with supervision of the judicial business of the whole court, and he should be responsible for the failure to utilize the judicial power of the commonwealth effectively": *Eliot, Brandeis, Storey, Rodenbeck, and Pound*. "Preliminary Report, etc."

"Any movement for better organization of courts should seek to concentrate judicial responsibility in a chief justice and to give him corresponding power. He should be an elective officer. Just as the lord chancellor in England, along with the ministry of which he is a part, is accountable to Parliament our chief justice should be accountable to the people for the effect and satisfactory working of the judicial department": *Roscoe Pound* before the Minnesota Bar Association.

9. By an act of the General Assembly of Illinois of January 26, 1826, it was provided: "For the purpose of procuring a uniform system of rules of practice at law and in chancery in the different circuit courts in this state, it shall be the duty of the judges of the supreme court to prescribe such rules and regulations as shall be most conducive to the correct administration of justice, not inconsistent with law. \* \* \*"

"One of the fundamental reasons is that in no other way can the courts be held responsible for their proper functioning. \* \* \*"

"A notable instance of the powerful tendency to rely upon authority delegated to expert hands is afforded by the Province of Ontario where

examples of such a situation in this state being Cook County, where we have a superior, circuit, and a municipal court with several judges), a plan by which the decisions of a single judge may, in a sense at least, be made the decision of the whole court, seems advisable. Such an arrangement would contemplate trials before the single judges, and unless the decision be questioned within thirty days it would become final. It could be provided, however, that within the said thirty days appropriate proceedings should be taken by a dissatisfied party to have the decision reviewed by a given number of the judges of the court, preferably not less than three, without the removal of the record or other formalities to occasion extra burdens, and thus dispense with any intermediate appellate court. From the decision of this court *en banc* an appeal would go direct to the Supreme Court.

Were the courts consolidated there would be in every county a bench of more than three judges, which would constitute a court of review.

The manifest advantages of such a plan would be realized in fewer appeals to the Supreme Court and in avoiding the too great influence of the individual notions of a judge, or, indeed, sometimes

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Parliament has not interfered with the progress of procedural development through rules of court over a period of thirty-five years and where an ideal system has been achieved": *Herbert Harley*, secretary, American Judicature Society in *ILLINOIS LAW REVIEW*, May, 1916.

"The basic error into which New York, the pioneer in reform of legal procedure, has fallen is in putting any hope in the attempt to regulate the details of practice by statutes alterable by the legislature. \* \* \* This is not at all work for the legislature. The tried and natural way out is to place the remedy in the hands of the courts": *Austin W. Scott*, *Felix Frankfurter*, and *Roscoe Pound* in *New Republic*, July, 1915.

All writers are not agreed upon the question of rule-making by the courts. *Kales* says, "We are often told that the rules of practice and procedure should be entirely settled by rules of court established by the judges or by a council of judges. Now this is an ideal arrangement as it exists in England by reason of the character of the judiciary and manner of selection, who may well compose an expert judicial council for making or revising rules of practice. On the other hand, Mr. Gilbert's idea of taking all responsibility for making the rules of practice from the judges and then fixing those rules in the minutest detail by legislative enactment, is admirably designed to fit a judicial organization where all the judges are independent; where they have no head with administrative powers and no responsibility; and when there is a constant change among the members of the bench": "A comparative study of the English and of the Cook County Judicial Establishments," *ILLINOIS LAW REVIEW*, December, 1909. See, also, *Kales*, "A Proposed Judicature Act for Cook County," in *ILLINOIS LAW REVIEW*, January, 1911.

"A compromise must be made; a middle course must be found between over-wide discretion and over-minute law making": "Report on Efficiency in the Administration of Justice," by *Eliot*, *Brandeis*, *Storey*, *Rodenbeck*, and *Pound*.

his personal feelings. It would also give to the decision the weight of decision of the whole court.

In some of the states, notably Delaware and New York, and formerly under the constitution of 1818, in Illinois, the judges are both trial and review judges, holding *nisi prius* courts in circuits or districts singly and reviewing appeals or writs of error *en banc*. This principle is therefore demonstrated to be workable and seems well enough adapted to such an arrangement as is above outlined. The writer, however, regards the plan of mingling the duties of trial judges with those of a supreme appellate court as inadvisable. However much we may pride ourselves on the integrity of our judiciary, it is very hard for the average litigant to persuade himself that a member of the court who has tried his case and decided against him will remain wholly aloof when the case comes before the higher court, of which he is a member, on appeal.

Instead of more, it should be made less difficult to appeal to the higher courts,<sup>10</sup> and the litigant should have a complete new deal, stripped of every connection with the court of initiation.

To this end, the value limitation should be abolished or materially lowered, and the cost of transferring and preparing records materially reduced.<sup>11</sup>

It should be within the power of the Supreme Court or any branch thereof to permit or order any cause to be brought before it for review,<sup>12</sup> and its decision should be final, regardless of errors or misconceptions in the lower courts.

If any evidence or proceeding is wanting it should be supplied in the Supreme Court without the necessity of further action in any other court.<sup>13</sup>

Anticipating that such provisions would add greatly to the business of the Supreme Court, the number of justices should be increased, and the sessions of the court should be held at points of greater convenience to avoid unnecessary loss of time and heavy expense.

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10. "In most jurisdictions there is too much appellate procedure. There is no reason why appellate procedure should be involved or technical. The appeal should be treated as a motion for a rehearing or for new trial, or, for vacation or modification of the judgment or order complained of before another court, and the procedure should be as simple as that upon motion": "Preliminary report on Efficiency in the Administration of Justice" by Eliot, Brandeis, Storey, Rodenbeck and Pound.

11. Const. of Nebraska, sec. 24, art. 1.

12. Const. La., sec. 101; Ohio, sec. 2, art. IV (In cases of public or great interest); Calif., sec. 4, art. VI.

13. So provided with reference to English courts.

(f) *Reports.* The reporting system is neither practical nor satisfactory. A system under which points of law passed upon scores of times must be reiterated and under which volumes of decisions accumulate with such rapidity as to make it virtually impossible to determine what is the law on a given point should be discarded.

A plan by which several volumes of decisions are issued annually, containing re-statements of points of law that have been repeated hundreds of times before but which must be paid for, treasured up, and reckoned with in all succeeding practice, cannot help but be unsatisfactory. A system should be devised for a uniform digest of the decisions.<sup>14</sup> to be published at the expense of the state, just as any other public document,<sup>15</sup> and capable of easy cumulation from year to year.

(g) *Selection, Tenure and Compensation of Judges.* The system of selecting and the terms under which judges hold are among the gravest defects of the judicial system of Illinois. Our plan of selection makes it possible that judges may be the creatures of sinister influence; that second or lower-rate lawyers may be selected as judges; and that the best judicial timber may be discarded or so illy provided for as to compel their retirement or render them inpecunious.

It is conceded on all hands that our manner of selection of judges, their tenure of office, and, to some extent, the amount of compensation are unsatisfactory. Capable judges are first consideration in our courts, and conditions of selection, tenure, and salary should be such as to invite capable lawyers to judicial office. The weight of opinion amongst lawyers who have studied the subject is perhaps in favor of the appointment of judges through some system of judicial recommendation rather than their popular election.<sup>16</sup> Such a course with us is out of the question under the

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14. Court's syllabus: W. Va., sec. 5, art. VIII; Utah, sec. 6, art. VIII. VIII.

15. Const. Mo., sec. 43 and 44, art. VI. An act of Mar. 31, 1819, of the G. A. of Illinois provided that "when the supreme court deemed it expedient to have its opinions published, they shall cause them to be delivered to the public printer to publish and distributed the same as the laws of the state;" and by an act in force Feb. 14, 1831, the price for printing supreme court reports was fixed at \$3.00 per volume, and the method of distribution was prescribed.

16. "The nearest approximation to the application of such a principle (selection by judicial power) that we could effect in this state (Illinois) or this county (Cook) would be the conferring of the power of appointing judges (to hold office during good behavior) upon a chief justice of the state

terms of the present constitution, and it is doubtful if consent can be obtained at any time within the near future for the selection of judges by any other means than popular election. Judges should not, however, be required to seek re-election again and again in order to maintain their position upon the bench. A plan might be beneficial, by which after a judge were elected once and served a term with sufficient satisfaction to merit and receive re-election, he would then hold during good behavior until the fixed age for retiring. Such a plan might be applied to both trial and Supreme Court judges.

The matter of compensation would present less difficulty if a reasonable system of retirement were in vogue. A suitable provision for the retirement of judges after having served fifteen years, if seventy years of age, with full pay during the rest of their lives would remove the cause of worry for the future and the temptations sometimes incident thereto.<sup>17</sup>

(h) *Clerks*. There should be but one clerk for all the various branches of courts in a county, who should be appointed and subject to removal and discipline by the court.<sup>18</sup>

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or the judicial head of Cook County, such judicial head to be elected periodically as a state or county officer": *Albert M. Kales* in *ILLINOIS LAW REVIEW*, Dec., 1909.

"In what may be styled fairly the classical period of American law the bench was for a greater portion of the time appointive, or if elective, elected by the legislature and tenure was assured for life. \* \* \* The constructive work in American law, the adaptation of English case law and English statutes to the needs of a new country and the shaping of them into an American common law was done by appointed judges while most of the technicality of procedure, mechanical jurisprudence and narrow adherence to eighteenth century absolute ideas of which the public now complains is the work of elected judges. The illiberal decisions of the last quarter of the nineteenth century to which objection is made today were almost wholly the work of popularly elected judges with short tenure. Moreover, where today we have appointive courts these courts in conservative communities have been liberal on questions of constitutional construction, where elective judges, holding for short terms, have been strict and reactionary. For illustration, one may compare the decisions of the Supreme Court of the United States and of the Supreme Judicial Court of Massachusetts on the subject of liberty of contract with those of the Supreme Court of Illinois, and of Missouri": citing other instances also: "Preliminary report on Efficiency in the Administration of Justice" by *Eliot, Brandeis, Storey, Rodenback* and *Pound*.

17. Retired at 70, Conn., art. V, sec. 3; N. H., art. II, sec. 77; New York, art. VI, sec. 12; the Constitution of La. provides for retirement on full pay after 75 if the judge has served 15 years: sec. 86 Const. All United States judges may retire on full pay after 70 years of age after serving ten years: sec. 260, Judicial Code.

18. Const. New Mexico, sec. 9, art. VI; Ark., sec. 7, art. VII; Calif., sec. 21, art. VI; Florida, sec. 7, art. V; Idaho, sec. 15, art. V; La., sec. 88; Mich., sec. 6, art. VII; Mo., sec. 39, art. VI; N. C., sec. 15, art. IV; S. C.,

### III. AMENDMENTS TO THE CONSTITUTION TO PROVIDE A SATISFACTORY ORGANIZATION OF THE COURTS.

The following amendments to article VI of the constitution would facilitate the unification of the courts:

(a) Amend Section 1 to read as follows:<sup>19</sup>

Sec. 1. The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and in such other courts as may be created by law, *Provided, that the general assembly may provide for consolidating all or any number of the courts inferior to the supreme court under one designation and organization throughout the entire state or in any circuit now existing or to be created according to law, or in any county or other division, and for the appointment by the courts of masters in chancery and commissioners with such judicial and other powers as shall be deemed expedient and of clerks and other employes for any or all courts. And provided, also, that the general assembly may abolish justices of the peace in any or all counties or any part of a county and police magistrates in any or all cities and villages.*

(b) Amend Section 2 to read as follows:

Sec. 2. The supreme court shall consist of *not less than seven nor more than twelve judges* and shall have original and exclusive jurisdiction in causes relating to the disbursement of state revenues through the state treasury and original jurisdiction in all other revenue matters and in mandamus and habeas corpus, and appellate jurisdiction in all other cases. *The supreme court may sit in divisions, with not less than three judges sitting in each division at such places and times as shall be fixed by law or by rule or direction of the court. When sitting either as a unit or in divisions, a majority shall constitute a quorum and the concurrence of a majority shall be necessary to a decision. The decision of any division shall be final unless taken by certiorari to the entire court in accordance with rules to be adopted by the supreme court, all the judges sitting for the consideration of such rules. The supreme court shall have power to determine by rules or orders what causes and proceedings shall be assigned to the various divisions of the court and the nature thereof, and the chief justice may designate what judges shall sit in each division, and may, for the purpose of expediting business,*

sec. 7, art. V; Texas, sec. 3, art. V; Utah, sec 14, art. VIII; Wis., sec. 12, art. VII.

Appointed by judges: Ala., 164, VI; Ariz., 17, VI; Colo., 9, VI; Kansas, 4, III; N. D., 92, IV; 12 V; Tenn., 13, VI.

See also, Kales, "A Proposed Judicature Act for Cook County," ILLINOIS LAW REVIEW, January, 1911.

"Above all, the court should be given control of the clerical and administrative force through a chief clerk, responsible to the court for the conduct of that part of the work": "Report, etc.," by Eliot, Brandeis, Storey, Rodenbeck, and Pound.

19. New matter in italics.

assign any judge of the supreme court to any division, or when, in his judgment, it shall be necessary, he may designate any judge of the circuit court to sit in any division of the supreme court.

(c) Amend Section 6 so as to read as follows:

Sec. 6. The term of office of judges of the supreme court shall be nine years and if any judge shall have served to the end of the term for which he was elected (either a full term or to fill a vacancy), and shall be re-elected, he shall hold office during good behavior, provided that he may retire after having served fifteen years, if seventy years of age, with full pay during the rest of his life, and provided, also, that all judges shall be retired upon reaching seventy-five years and if they have served for fifteen years either continuously or at intervals, they shall be entitled to receive full pay at the rate provided for by law at the time of reaching seventy-five years of age. On the first Monday in June of the year in which the term of any of the judges in office expires, there shall be an election for the successor or successors of such judge or judges in the respective districts wherein the term of such judge or judges shall expire. The chief justice shall be elected from the state at large at such time as shall be provided by law, shall hold his office for such term not less than six years as may be fixed by law, shall be eligible to re-election, but shall not serve as chief justice for more than twenty-four years, nor after reaching the age of seventy-five. Any judge who has been twice elected either as chief justice or associate judge of the supreme court, if not re-elected as chief justice and not eligible to retirement shall continue as an associate judge during good behavior and until retirement. Any person having been elected a chief justice and having been twice elected to the supreme court either as an associate judge or chief justice, and having served the terms for which he was elected, (whether full terms or to fill a vacancy or vacancies), may retire at seventy years of age or at the end of the term nearest the time when he shall be seventy years of age and receive full pay at the rate payable at such time for the remainder of his natural life.

The general assembly may confer upon the chief justice such supervisory power over the supreme court and all courts inferior thereto as shall be deemed expedient and may provide that any or all of the judges of the supreme court or of any inferior court may be appointed by the governor on the recommendation of the chief justice, or of a council of judges instead of being elected, and may fix the terms for which judges shall be appointed, which may be during good behavior or for a definite term, provided that no person shall be eligible to serve as a judge of any court after having reached the age of seventy-five.

(d) Amend Section 11 to read as follows:

Sec. 11. Inferior appellate courts of uniform organization and jurisdiction may be created in districts formed for that purpose, to which such appeals and writs of error, as the general assembly may provide, may be prosecuted from circuit and other courts and from

which appeals and writs of error shall lie to the supreme court, in all criminal cases, and in cases in which a franchise or freehold, or the validity of a statute is involved and in such other cases as may be provided by law. *Provided that the supreme court may order any cause pending and determined in any court to be submitted to any branch or the entire supreme court for review at any time within six months after a final decision.* Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner as may be provided by law; but no judge shall sit in review upon cases decided by him; nor shall said judges receive any additional compensation for such services. *Provided that the general assembly may provide by law for a review of decisions made by a single judge or a single judge and jury in any circuit, district, county or city where there are three or more judges of any court, by the whole court, or by any number of judges thereof, not less than three, instead of by such inferior appellate court and without removal of the record or other formalities in respect to such decision, and from the decision of such court of review, appeals, writs of error or proceedings in certiorari, shall lie to the supreme court, under such regulations as are now or as shall hereafter be provided by law.*

(e) Amend Section 12 to read as follows:

Sec. 12. *The circuit courts, or any court into which the circuit courts shall be merged, shall have original jurisdiction of all causes not excepted in this constitution, and such appellate jurisdiction as is or may be provided by law, and in the administration of justice shall recognize any right or grant any relief to which any person may be entitled in law or equity, regardless of the form or character of the proceedings. The circuit courts, or any court into which it may be merged or of which it may form a constituent part, shall have power to make such uniform rules and regulations concerning practice and procedure and to alter the same as shall be deemed expedient. In the absence of any such rule or regulation by said courts upon a particular point of practice or procedure, the provisions of the general laws relating thereto, if there be any, shall govern, and if there be neither a rule by the court nor a provision of the statute applicable thereto, the court shall determine the proper practice or procedure, but the decision of the court thereon may be reviewed as other questions of law. The circuit court shall hold two or more terms each year in every county. The terms of office of the judges of the circuit court shall be nine years and if any judge shall have served to the end of the term for which he was elected (either a full term or to fill a vacancy), and shall be re-elected, he shall hold the office during good behavior, provided that he may retire after having served fifteen years, if seventy years of age, with full pay during the rest of his life; and provided, also, that all judges shall be retired upon reaching seventy-five years of age, and if they have served for fifteen years, they shall be entitled to receive full pay at the rate provided by law, at the time of reaching seventy-five years of age.*



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## EDITORIAL NOTE

The eighth annual meeting of the American Institute of Criminal Law and Criminology was held at Chicago, August 29, 1916. There were three sessions and all were well attended. Vice President Hampton L. Carson, former attorney-general of Pennsylvania, presided. Mr. Carson, upon taking the chair, delivered an eulogy upon the high character and ability of Judge Robert Ralston of Philadelphia, former president of the Institute, who died last January.

Dean John H. Wigmore, of Northwestern University Law School, introduced Attorney-General Lucey of the State of Illinois, who spoke upon the growing need for institutions in Illinois and other states for the insane. His most amazing statement was the fact that in Illinois the number of inmates in the state charitable, penal and reform institutions had been increasing at the rate of 100 per cent every four years for the last decade. He dwelt upon the cosmopolitan nature of the population of Illinois, and called attention to the condition of living, and the nervous strain under which the weak do not seem to survive in the business world today. He suggested that lack of recreation was one of the causes for this appalling increase. He suggested that this problem be studied by the Institute, and some effort be made to ameliorate present conditions.

The Society of Military Law, a section of the Institute, held a special meeting on August 30, 1916, in Chicago.

A number of committee reports were read, one of the most important being presented by Chairman Edwin R. Keedy of the committee on "Insanity and Criminal Responsibility." This report was a review of the work covered by the committee since its creation in Washington, in 1910. Attention was called to the tentative draft of the bill proposed in 1911, which was subsequently amended, and the committee asked and secured the approval of the Institute, on the following draft:

"Sec. 1. No person, suffering from mental disease, shall hereafter be convicted of any criminal charge, when at the time of the act or omission alleged against him, he did not have, by reason of such mental disease, the particular state of mind which must accompany such act or omission in order to constitute the crime charged.

"Sec. 2. When in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased at the time when he did the act or made the omission charged, then if the jury before whom such person is tried concludes that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, then the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not at the time legally responsible, by reason of his mental disease.

Sec. 3. When such special verdict is found, the court shall remand the prisoner to the custody of (the proper officer) and shall immediately order an inquisition by (the proper persons) to determine whether the prisoner is at that time suffering from a mental disease

so as to be a menace to the public safety. If the members of the inquisition find that such person is mentally diseased as aforesaid, then the Judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody."

The committee also called attention to the draft which was submitted in 1914, of a bill which at that time had been unanimously approved relative to: (a) summoning of witnesses to court; (b) examination of an accused by state's witnesses; (c) commitment to hospital for observation; (d) written report by witnesses; and (e) consultation of witnesses.

This bill had been approved by the conference on Medical Legislation of the American Medical Association, and, with the exception of the third section, by the committee on Jurisprudence and Law Reform of the American Bar Association. The bill as approved by the Institute was introduced in the legislatures of several states, although it did not pass any of them. After careful re-examination, it was decided that the bill was too comprehensive, and that it should be consolidated and amended. The committee therefore presented a new bill which, after considerable discussion, was approved by the Institute, as follows:

**Sec. 1. SUMMONING OF WITNESSES BY COURT:** Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

**2. WRITTEN REPORT BY WITNESSES:** When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either

party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense.

The report on "Crime and Immigration", together with a report on "Sterilization of Criminals", were presented and discussed, but no definite action was taken.

Chairman Edward Lindsey, of Pennsylvania, presented the report on "Indeterminate Sentence, Release on Parole and Pardon." This compiled to date the statutes enacted since the 1915 meeting.

A very interesting and valuable feature of the meeting was the annual address by Hon. Robert O. Harris, of Massachusetts, on the subject "Probation—Its Relation to Social Welfare." He discussed the intricate difficulties presented to the probation officer in trying to reach the human side of the derelict who is to be reclaimed. When he concluded, Joel D. Hunter, chief probation officer of the Municipal Court of Chicago, spoke on his impressions of the Chicago side of the problems presented. Among other things he said:

"We are trying to work out some of these suggestions here. Our system has been to keep as many cases out of court as possible. My work has been confined chiefly to the Juvenile Court. We try to find out the reason for a child's wrong-doing. We investigate its environment, and try to find its place in the community. The probation officers have a definite place in the community in solving these problems. Their work cannot be done by any other branch of social service. They try to find out what the trouble is, and then to correct it. A real agency for usefulness can thus be established which will help solve the problem of reforming boys and girls."

Support was pledged for the establishment of state branches during the coming year, in Oklahoma, Kansas, and California. New officers were elected as follows: President: John P. Briscoe, Judge of the Maryland Court of Appeals, Annapolis, Maryland; Vice Presidents: Harry Olson (Chief Justice Municipal Court, Chicago, Ill.), Hampton L. Carson (former attorney-general of Pennsylvania, Philadelphia, Pa.), Thomas Mott Osborne (warden Sing Sing prison, Ossining, N. Y.), Robert O. Harris (former member of Congress, Boston, Mass.), Walton J. Wood (Public Defender, Los Angeles, Cal.); Secretary: Edwin M. Abbott

(former chairman of the Pennsylvania Commission on the Revision of Penal Laws, Land Title Building, Philadelphia); Treasurer: Bronson Winthrop (32 Liberty street, New York City); Executive Board—for term expiring 1919: Louis N. Robinson (Professor of Sociology, Swarthmore College, Swarthmore, Pa.), Joel D. Hunter (Chief Probation Officer, Juvenile Court, Chicago, Ill.), Chester G. Vernier (professor of law, Stanford University, Palo Alto, Cal.), Bernard Glueck (M. D., director of Psychiatric Clinic, Sing Sing Prison, Ossining, N. Y.).

EDWIN M. ABBOTT.

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## CORRESPONDENCE

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### THE BETHANY TELEPHONE CASE.

TO THE EDITOR OF THE ILLINOIS LAW REVIEW:

On page 281 of the November issue of *THE REVIEW* is a criticism of the opinion in the *Bethany Telephone Case*, 270 Ill. 183. The gist of the criticism (page 282) is:

"The objection to the rule of the Bethany case is that it invites abuse and places the determination of whether a business is public or not on a wholly artificial basis. It is like accepting the declaration of innocence of the indicted man as proof in a criminal prosecution instead of the testimony of the eye-witnesses of the crime. If the business conducted is in fact public it should be so treated, although the company has exceeded its charter powers."

As one of the counsel in the case *supra*, I will be pardoned for a brief reply, necessary to refute the above criticism.

The Bethany Company secured a charter, but had transacted no business whatever when the Board of Public Utilities, at the instance of another telephone concern (thinking the Mutual Company had as its members some of the subscribers of the old concern), sought to enjoin the Mutual Company from erecting telephone poles, etc. Before the Supreme Court could have upheld the restraining order issued by the Utilities Commission it would be necessary to presume in advance that the Mutual Telephone Company would violate its charter, and the law of the state. In other words, that a corporation, expecting to engage in interstate commerce should be prosecuted or penalized before it begun business, is the theory of the critic, for the reason that such corporation might in the future violate the anti-trust act. This is the logic of the critic.

In the *Bethany case, supra*, there was no "eye-witness of the crime," because no crime was committed or wrong done. Neither was there any evidence in the case remotely tending to prove that any wrong was contemplated. Would our critic have the Supreme Court guess in advance that the "indicted man" was guilty? Furthermore, at this writing, the Bethany Company has been in operation for some time and has violated no statute. The proposition, I may say in passing, that a private corporation (as the complaining telephone company in the case *supra*) can compel the citizens of a community to patronize it (or have no telephone service), irrespective of their wishes in the matter or the character of the service given, and restrain the inherent rights of the citizens to construct their own telephone plant for their own mutual use and benefit and not for general public service, would be so unfair, unreasonable, and tyrannical, that it would not appeal to the conscience of the Utilities Board or of any court. When rightly understood upon the facts before the court, the *Bethany Telephone Case* was decided correctly; the decision is manifestly just and is in harmony with all the better considered cases, as is abundantly shown by our briefs filed in that case when heard by the Supreme Court. The critic has assumed matters not proven, and, his premises being founded on speculation rather than fact, his "logic" is untenable.

JOHN R. FITZGERALD.

[The purpose of the Bethany association is: "to be for the private use of the members of said association only, for the purpose of telephonic communication between them for their private and community interests," and not for profit. The language is that of the articles of incorporation, as quoted by the Supreme Court. The public utilities law necessarily distinguishes between "public" telephone enterprises and "private enterprises." By describing their enterprise as "private" in their application for a charter, the incorporators stated a conclusion of law, which the court should have tested. Instead of so doing, the court accepted the conclusion of the incorporators, and permitted the enterprise to proceed. If the reasoning of this decision be sound, what is to prevent warehouses, gas and electric plants, and other utilities from being established at will on the unsupported claim of the promoters that their business is to be private?

Mr. Fitzgerald regards the non-duplication provision of the public utility law as an invasion of private right. He is not in sym-

pathy with the principle of regulated monopoly in the domain of public service. He is not concerned with upholding the declared policy of the state. Our criticism of the court's opinion reflects in no manner on his clients. We accept his assurance that the business of the Bethany association is in fact as well as in law, private. But neither the opinion of the court nor his letter shows why such business is private and lies outside the provisions of the public utility law. The opinion of the court at least should have stated convincing reasons.

In *Public Utilities Com. v. Noble*, 275 Ill. 121, the court applied the acid test of fact to the conclusion of the promoters of the mutual telephone enterprise, that their business, *when established*, would be private in law. It was unable to concur in their conclusion. We commend this decision to the consideration of Mr. Fitzgerald. What, in his opinion, is the essential difference between this and the *Bethany case*, as reported by the Supreme Court, other than that in the one a conclusion of law was asserted in a proceeding before the commission and in the other the same conclusion was asserted in the application for articles of incorporation? This distinction is too fine for practical purposes, especially in view of the ease with which articles of incorporation can be amended under our law.

W. D. K.]

## COMMENT ON RECENT CASES

**CARRIERS—CARMACK AMENDMENT—INSURER'S LIABILITY—LIMITATION OF LIABILITY—ALTERNATIVE RATES.**—In *Cincinnati etc. Ry. Co. v. Rankin*, 36 Sup. Ct. Rep. 555, the United States Supreme Court held that the Carmack Amendment, making the carrier receiving the goods for transportation liable for loss to property "caused by it" or any connecting carrier, did not, by the underscored word, abolish the carrier's common law liability as insurer with respect to losses occurring on its own line.

The court also held, following the case of *George N. Pierce Co. v. Wells-Fargo & Co.*, 236 U. S. 278, 283, that in order to support a stipulation limiting liability, "alternative rates fairly based on valuation" must be offered, but that a statement in a bill of lading signed by both parties, containing a limitation of liability, and reciting that lawful alternative rates based on specified values had been offered, constituted an admission by the shipper that such rates had in fact been offered, and prima facie evidence of the fact. The case intimates that the doctrine that stipulations restricting liability must be supported by the consideration of reasonable alternative rates had already been established by the case of *George N. Pierce Co. v. Wells-Fargo & Co.*, 236 U. S. 278, 283. But that case seems to have no bearing on the subject. Moreover the case of *Cau v. Texas etc. R. Co.*, 194 U. S. 427, cited in the opinion, is a decision to the contrary. It held an alternative rate need not be shown in order to support a stipulation restricting liability, the stipulated freight charge in the bill of lading being of itself sufficient consideration.

The authorities are divided on the subject. The following cases hold that reasonable alternative rates are necessary in order to afford a consideration for the stipulation:

*Little Rock etc. R. Co. v. Cravens*, 57 Ark. 112; *McIntosh v. Oregon etc. R. Co.*, 17 Idaho 100; *Pittsburgh etc. R. Co. v. Mitchel*, 175 Ind. 196; *Wekmann v. Minneapolis etc. R. Co.*, 58 Minn. 22; *O'Connor v. Great Northern R. Co.*, 120 Minn. 359; *Freeman v. St. Louis etc. R. Co.*, 138 Mo. App. 320; *Louisville etc. R. Co. v. Turner*, 100 Tenn. 213.

The following cases hold that alternative rates are not necessary and that the stipulated charge is a sufficient consideration to support the stipulation: *Cau v. Texas, etc. R. Co.*, 194 U. S. 427; *Arthur v. R. R. Co.*, 139 Fed. R. 127.

L. M. G.

**RECORDING ACT—JUDGMENT LIEN—SUBSEQUENTLY ACQUIRED LAND—PURCHASER FOR VALUE.**—In *Sparrow v. Wilcox*, 272 Ill. 632, the Supreme Court upheld the right of a defrauded grantor of land, in a conveyance made subsequent to the entry of a judgment against the grantee, to set aside the deed and recover his land as against the judgment creditor. The court held the record-



ing act, providing that deeds shall take effect from the time of filing the same for record, as to creditors and subsequent purchasers without notice, had no application; that the case was governed by the "judgment" act, which provides that a judgment of a court shall be a lien on the judgment debtor's real estate for seven years.

The correctness of the decision seems not open to question. The recording act seems clearly intended to protect the creditor or purchaser in relying on the title as the record discloses it to be at the date of entry of his judgment or of the recording of his deed. Subsequently acquired titles are without the scope of the act. Since the recording act did not apply, the judgment creditor's lien attached only to such title as the judgment debtor, the defrauding grantee, acquired under the deed to him. Since the latter's title was subject to be overthrown at the suit of the defrauded grantor, the judgment lien stood in no different or better situation.

The views of the court with respect to the recording act seem to find some support in the numerous cases sustaining the right of a holder of mortgage notes to set aside a fraudulent or inadvertent release of the mortgage or trust deed, as against prior judgments or conveyances intervening between the dates of record of the mortgage and of the release.

The court also held that one receiving a conveyance of land in discharge of an antecedent indebtedness was not a purchaser for value within the protection of the recording act.

L. M. G.

**LIFE INSURANCE—RETURN OF PREMIUM AS A CONDITION OF PLEADING INVALIDITY OF POLICY.**—The rule that an insurer, upon receiving notice, prior to a loss under a policy, of a breach of warranty or condition forfeiting the policy by its terms, must take affirmative action to declare the policy void, or be deemed to have waived the right to insist upon the forfeiture, although rejected in many jurisdictions, may be considered as the established law in Illinois: (*Kelly v. People's National Fire Ins. Co.* (1914), 262 Ill. 158; *Phenix Ins. Co. v. Johnston* (1892), 143 Ill. 106). In one of the leading cases on this point, it is stated that "if the company retains the premium and does not elect to cancel the policy, it will be held to have waived the condition and to be liable under the policy: (*Phenix Ins. Co. v. Grove* (1905), 215 Ill. 299).

In the recent case of *Seaback v. Metropolitan Life Ins. Co.* (Supreme Court of Illinois, Oct. 24, 1916), 113 N. E. Rep. 862, the policy was void by its terms from its inception, the grounds and fact of invalidity, however, not coming to the knowledge of the insurer until after the death of the insured which occurred about two years after the issuance of the policy, during which period premiums had been paid. Following the dictum in the case of *Dickerson v. Northwestern Mutual Life Ins. Co.* (1902), 200 Ill. 270, the court (Duncan, J.) held that in such a case, the policy being void *ab initio*, the assured, provided he had not been guilty of fraud, and that the contract was not against law or good morals,

could recover back the premiums paid, on the ground that no risk was ever assumed by the insurer. This appears to be the general rule: (Cooley, "Briefs on Insurance," Vol. 2, pp. 1040-1044, and cases cited), and it is said that such premiums may be recovered back either in an action for them alone or on a count for money had and received, coupled with a count on the policy in an action for the loss: (May on Insurance, 4th Edition, Sec. 567).

In the *Seaback case*, however, the court, rejecting a further dictum in the *Dickerson case*, refused to hold that the insurer was obliged to tender back the premiums paid as a condition precedent to pleading the invalidity of the policy, and this, it is submitted, is the correct rule in such a case. The rule quoted above from the *Grove case*, even though it may be justified upon grounds of equitable estoppel (a question concerning which there seems to be some ground for argument) can hardly be extended to the facts of the *Seaback case* where the breach was not known to the insurer until after the death of the insured; moreover, as pointed out by the court, after the death of the insured, his administrator, and not the beneficiary, would be the proper party to recover back the premiums paid by the insured, there being no privity of contract between the insurer and the beneficiary as a basis for such recovery by the latter: (*Sullivan v. Metropolitan Life Ins. Co.* (1899), 174 Mass. 467).  
H. C. H.

**PUBLIC UTILITY DISTINGUISHED FROM PRIVATE BUSINESS—MUTUAL TELEPHONES—TEST OF PUBLIC PROFESSION.**—In a third case the claims of a mutual telephone company to be exempt from the operation of the public utilities law have been decided. *Public Utilities Comm. v. Noble*, 275 Ill. 121. For the two previous decisions see XI ILL. LAW REV. 281. The court follows the rule declared in *Public Utilities Comm. v. Noble Telephone Co.*, 268 Ill. 411, that when a mutual company connects its lines with a commercial company for the interchange of messages, the use of the mutual lines is public and the company is a public utility.

The order of the commission was entered on a petition of a commercial company against a number of natural persons in their capacities as individuals and as representatives of some two hundred farmers and others. The case was submitted on a stipulation of facts, which showed that the respondents proposed to organize a mutual association not for profit when the telephone exchange was completed. The commission ordered respondents to cease and desist from operating a telephone exchange until a certificate of public convenience and necessity should be obtained from the commission under section 55 of the public utilities law. The order was sustained by the Supreme Court.

The farmers' mutual telephone company is a distinctively co-operative undertaking. In the past twenty years it has had great vogue in the middle western states. It is the very antithesis of the supposedly soulless corporation which public service commissions

are created to curb and minister unto. It is a curious anomaly that a popular law should rise up to curb a democratic movement.

Mature reflection will lead inevitably to the conclusion that the statute is right and the democratic movement wrong. Telephone service is public because it fills a public need or necessity. Therefore, it should be permanently and soundly builded. Reliable telephone service in country districts requires good equipment, well-built lines, efficient maintenance and adequate depreciation funds. Farmers' mutual companies, organized to furnish "cheap" service and supported by assessments on members, are not efficient agencies to procure reliable service.

Where the farmers' mutual is the only agency available it may be conceded to be better than nothing. Where it undertakes to encroach on the established service of a commercial company it becomes a competitive instrument of destructive tendencies. In states where it is held to be outside the scope of the utility statutes designed to prevent destructive competition it is a bugbear to the smaller commercial companies. In states where it is under the law, it is the thorn in the flesh of the commission, causing endless annoyance because of the lack of practical business experience of its officers and managers.

The mere fact that three cases have gone to our Supreme Court in less than three years, involving the status of such organizations under our law, indicates that the farmers' mutual is still a problem in Illinois. Usually these organizations possess considerable political power. The Supreme Court has undoubtedly taken the correct view of their status in the cases presented, although we would be better satisfied with the *Bethany* case were it based on the proposed plan of operations of the company instead of on its articles of incorporation. The important point is that the court has given a liberal construction to the term "public use" which the legislature employed in defining a public utility. If the mutual organizations are dissatisfied and have the requisite strength they can appeal to the legislature for relief. This is the forum where it should be decided in any event whether the commercial companies or the mutuals are to be encouraged.

W. D. K.

#### STREETS AND HIGHWAYS—OBSTRUCTIONS—SPECIAL INJURY.—

The case of *Fors v. Anderson*, 270 Ill. 45, 110 N. E. 361, presents an addition to the law upon two troublesome questions connected with obstructions of public highways, to-wit: (1), What is a *special injury* within the rule that a private citizen cannot obtain redress on account of a public nuisance without a showing of such; and (2), when can he appeal to equity to abate such obstruction, assuming he is entitled to individual relief.

Upon the first question the court holds that one who abuts upon the highway and owns property, bought relying upon the highway existing as it was represented by the plat, suffered an injury different than the general public, when other abutters encroached

upon the highway with their buildings. This rule, apparently, was based upon the consideration that an abutter had an easement of access to and egress from his property, and of light and air in connection with it which would be interfered with by encroachments: (see also *Barnard v. City of Chicago*, 270 Ill. 27-31, 110 N. E. 412 injury from construction of tunnel in street opposite to the property). That raises the question: Is the definition of *special injury* from obstructions in highways, confined to the owner of the property which is opposite to or abuts on the part of the highway where the obstruction is?

In *Hill v. Kimball*, 269 Ill. 408-413, it was suggested that the situation of being injured differently than the general public is not to be confined to immediate abutters (in that case upon the strip of vacated street). *Special injury* in Illinois by force of these cases is treated as synonymous with injury different from that sustained by the general public. On the other hand, the mere fact that the person seeking redress uses the particular highway more than the general public, does not invest him with the rights of one who suffers a special injury, for it seems the difference must be in kind and not in degree: 37 Cyc 250. Suppose, then, that a person abutting at one end of a highway with a place of business, depends for his customers upon the travel of people along the street and by his place of business, and suppose the street is obstructed a half mile from his place of business and thereby the stream of travel is cut off. Cannot it be said that the injury thus sustained by him is different in kind from that sustained by the general public? To the extent that he had in a sense capitalized the fact in his business that the travel coursed that way, the answer would have to be in the affirmative. That seems to be the sense of the authorities at large. *Spencer v. New York & New England R. R. Co.*, 62 Conn. 242 (though there the result of the obstruction was total isolation); *Stricker v. Hillis*, 17 Idaho 646.

In Minnesota the principle is well brought out in a case where the complaining party had an established business of running a steamboat line, and an obstruction of the stream interfered with that business: *Viebaum v. Board of County Commissioners*, 96 Minn. 276-281; though in Massachusetts an obstruction of a bridge that interfered with the passage of customers by a lumber merchant's place of business, was held not a special injury. Apparently the latter case held that to constitute such special injury the obstruction must be adjacent to the premises: *Willard v. Cambridge*, 85 Mass. 574. Illinois would seem to adopt the theory of the Idaho and Minnesota courts. Thus an obstruction of a highway leading to a cemetery was held to be a special injury to those who had members of the family buried there: *Nelson v. Randolph*, 222 Ill. 537.

Upon the other question, i. e. that of equity jurisdiction, the expression of the principal case is that equity will take jurisdiction if the right is clear, and it appears the act will result in irreparable

injury; that upon the question of irreparable injury it is sufficient if the right interfered with is "highly convenient and beneficial." As stated in 9 ILLINOIS LAW REVIEW, 278, it is difficult to understand what the court means when it says the right must be clear, unless it be meant that it must appear that the way was in *fact* a public highway or, assuming it a public highway, that there was in *fact* an obstruction. If the facts be admitted and there is only a question of law as to the right, this part of the rule seems satisfied: *Roloson v. Barnett*, 243 Ill. 133. In other words, equity will not try the facts. As to the other element, however, that of irreparable injury, it seems that the elucidation of the requirement of "highly convenient and beneficial" is as vague as the term thereby attempted to be explained, unless, indeed, it be intended to distinguish thereby between a temporary injury and a permanent one, upon the theory that a permanent injury of a right is sufficient, even though the right be one not absolutely essential to the enjoyment by the abutter of his property.

E. M. L.

WHAT IS COMMON LAW?—PRINCIPLES V. RULES—STARE DECISIS.—In *Ketelson v. Stilz et. al.*, 111 N. E. Rep. 423 (Indiana S. C., 1916), the plaintiff claimed to have been defrauded in an exchange of real estate by brokers representing the plaintiff, and by plaintiff's grantee. Plaintiff brought action against the grantee for fraudulent representations and recovered judgment upon which an execution was returned *nulla bona*. Later plaintiff brought action for the same deceit against the brokers who were joint tort-feasors with the grantee. In the second action, the defendants contended that recovery of judgment against the grantee and the issuance of execution, operated to release the other tort-feasors from liability in accordance with the doctrine of *Brown v. Wooten*, (1606) Cro. Jac. 73, Yelv. 68f, *Buskland v. Johnson*, 15 C. B. 145, 2 C. L. Rep. 784, and *Brimsmead v. Harrison*, L. R. 7 C. P. 547, 41 L. J. C. P. (N. S.) 190. Defendants further contended that the doctrine of these cases was the common law of England at the time of the settlement of Jamestown and that this doctrine had become the law of Indiana by force of the statute which provides:

"The law governing this state is declared to be the common law of England, and statutes of the British Parliament made in aid thereof prior to the reign of James the First (excepting certain enactments) and which are of a general nature, not local to that kingdom. . . ."

The court says of this provision:

"It is not the purpose of this section to adopt the *rules* of the common law, but the purpose was to adopt the *general principles* of the common law which underlie and control all rules of decision throughout all time. . . ."

But, first, we are confronted by an interrogation—How do "rules" of common law differ, if at all, from "principles" of common law? Nothing is oftener seen in law writing, official and unofficial, when the path becomes thorny and broken, than the invocation of "principles." They are a kind of sanctuary where all

pursuit ends. In a somewhat different connection, Salmond has pointed out that when courts speak of principles it is a "sure indication of the impending establishment of an original precedent": (*"Jurisprudence,"* 1st ed. (1902), p. 177). There is real scientific need of making more precise a term such as this, which enters frequently in the technical language of lawyers. In the prevailing fashion, the term principle is uncertain both in denotation and connotation.

There seem to be, however, at least three entirely distinct and useful meanings which may be attached to it: (1), as opposed to fixed and authoritative declarations of legal rules, it may mean (in the sense indicated by Salmond) the fountain of original precedent—the complex of inherited ideas, environment, and social reasoning of the judge called upon to decide a question, where the path has not already been marked out, and where his philosophy of life must enter, to cut out a highway for future travelers; (2), in another sense, in the usage of logic, principle may mean generalization of what may be gathered from particular phenomena—in this sense "principle" is related to "rule" as genus to species; (3), lastly, it has been said, "a legal principle is a regulation covering a relatively broad field of social activity . . . . The opposite is true of a mere rule. This covers a narrow field only": (Bruncken, *"Interpretation of Written Law,"* XXV Yale Law Journal, 139 seq.)

These three uses of the term principle, which may be summarized by the contrasts, "discretion v. rule," "generalization v. fact," and "ends v. means," probably do not exhaust its possibilities. In another sense, it may be taken to mean a dominant idea among a plurality of ideas; the leading consideration among several considerations; the most important or controlling rule in a conflict of rules; in a manner analogous to the varying significations of the term "intent." In still another less applicable sense, principle may be taken to mean the primary (in point of time) idea or rule in comparison with other ideas or rules; thus the idea of a higher commercial valuation of property than of life manifested in earlier decades of our legal history, the idea of personal liberty and personal responsibility as against social control.

It now remains to see in what sense the Indiana court has employed this much used, abused, and misunderstood term. The court says:

"The common law of England was derived from the universal usage and custom of the early English people, and is a system of jurisprudence founded upon principles of justice as it was conceived and administered by the English courts of law in contradistinction to the method of administering justice employed by the courts of equity, and that system of jurisprudence which formed the basis of the Roman or civil law. From this common law system, and from the usages, customs, and maxims upon which it is founded, innumerable rules and principles emanated as the courts from time to time declared what they understood to be the correct law [*"richtiges Recht"?*], applicable to the matter before them, and such a law was determined by a system of reasoning and of administering justice consistent with the universal usages, customs, and institutions of the English people. The common

law grew to be a system of applying to litigated instances just, reasonable, and consistent rules of decision, suitable to the genius of the people and to their social, political, and economic conditions, *and the system once established has never changed.*" (Italics ours.)

This paragraph introduces a new difficulty without furnishing a clear answer to the question under consideration, viz.: "do principles differ from rules?" Fine language and bad logic are often found together, and precisely in those situations differing from the general rule as stated by Holmes (that experience has been the life of the law), where logic is not entirely negligible. At any rate, when we are led to undertake a cloud-soaring venture of dealing with such elusive ideas as "principles" and "correct law," we feel the need of what aeronauts call a stabilizer. It may, however, well be that what seems a want of consistency is only the distortion of the landscape viewed from an unaccustomed height.

However, it is a little startling to find the statement that common law grew to be "a system of . . . just . . . rules of decision" as a point of distinction to differentiate common law from equity and from the civil law. Again, we find in this paragraph that rules and principles are put together. The difficulty adverted to is that, according to the court we have adopted the "principles" of the common law, but according to the result we did not adopt the "rules" of common law.

The case is a good illustration of the second of the two types of natural law doctrines, both of which still flourish in our system of law. The first type is based on the proposition that the old common law of the period antedating the revolution is the repository of rules, truths, and ideas which the courts of the present day may consult as oracles of eternal justice. The court seems to hark back to this notion when it says—"the system once established has never been changed." (But just what that system is, remains to be told.) The second type of natural law is that which assumes that the cloistered judicial mind may withdraw from the turbulence and multiplicity of the outer world, and by returning upon itself may light the calm, cold flame of pure reason and thereby illumine the dark highways of all human conduct. So far as it is right to speculate, this was the point of view of the court. The next paragraph quoted justifies this speculation, and also furnishes a clear answer to the question first raised. The court says:

"The principles of the English common law system, as its theory assumes and its history proves, were not applicable or suited to one country or condition of society only, but, on the contrary, by reason of their properties of expansibility and flexibility, their application to many become practicable. . . . Whether so-called common law rules have been followed strictly in the several states depended upon the extent to which they have seemed reasonable, and for this reason what are considered proper rules of the common law in one state are not necessarily so considered in another, and likewise rules considered proper dictations of the common law in the eighteenth century are not so considered in the twentieth. Since the courts have had an existence in America, they have never hesitated to take upon themselves the responsibility of saying what are the proper rules of the common law. . . . Neither precedents nor opinions of judges can be

said with strict propriety to be the law. Although they are to be regarded as proper exponents of the law as adopted, they are to be received merely as evidence of the law rather than as the law itself. . . . The theory of our adopted system is that the law consists, not in the actual *rules* enforced by the decisions of the courts, but consists only in the *principles* from which these rules flow. Under the section of the statute relied on, where there are no governing enactments of the legislature, the courts of this state are, in all matters coming before them, to endeavor to administer justice according to the *promptings of reason and common sense, which are the cardinal principles of the common law.* (Italics ours.)

Here, at last, we believe we have something definite which paradoxically becomes indefinite at the very moment of discovery. It is clear, (1), when we adopted the common law of England we did not necessarily adopt the "rules" of common law; (2), we did adopt the "principles" of common law; (3), "principles" of common law are not "rules" of common law; (4), the "rules" of common law may or may not agree with the "principles" of common law: (in this case they failed to agree); (5), common law, therefore, consists of "principles," and "principles" are "the promptings of reason and common sense." It is clear, of course, that we could not adopt the "promptings of reason and common sense" of our English ancestors—something entirely subjective is the essence of the thing. It follows, therefore, by irresistible logic that when the Indiana legislature said that "the law governing this state is . . . the common law of England," it meant, and could only have meant the "promptings of reason and common sense" of the Indiana Supreme Court. This anachronism is neither more nor less serious than the fiction of a coastline in Bohemia, or the use of howitzers at the siege of Troy.

Moreover, the quality of expansibility and flexibility attributed to the common law as against other systems of law, has not always been the particular merit while the Indiana Supreme Court has discerned. On the contrary, the same court in an earlier day (*Spencer v. State*, 5 Ind. 41, (1854), said:

"We think that system of jurisprudence [meaning law] best and safest which controls most by fixed rules, and leaves least to the discretion of the judge; a doctrine constituting one of the points of superiority of the common law. . . ."

The court's reliance in the principal case upon the fiction that the Anglo-American body of law is a closed and complete system of rules even to the last details seems somewhat irrelevant. There is such a theory, now everywhere recognized as a pure fiction, but nevertheless employed to conceal the fact that courts legislate, and for the retraction of judicial mistakes. The real question is that of *stare decisis*.

While the court recognized that *Brown v. Wooten* stated the rule of law which prevailed in England in the year 1607, it declined to follow that rule, although it had been adopted in Indiana, and had been judicially authenticated as late as the year 1896: *Davis v. Scott* (1822), 1 Blackf. 169; *Allen v. Wheatley* (1834), 3 Blackf. 332; *Ashcraft v. Knoblock* (1896), 146 Ind. 169.



The labored discussion about principles borrowed from *Metropolitan Casualty Insurance Company v. Clark*, 145 Wis. 181 (but not there used with like effect), superadded to the maxim (irrelevant here) of "cessante ratione cessat ipsa lex" was clearly only a means of a rather furtive and wholly illogical exit from a troublesome situation. (Cf. XVI Col. Law Rev. 499, 510.)

How difficult the situation was may be seen when it is found that in only a very small minority of the states does the rule obtain that anything less than satisfaction is a bar to such an action. It must furthermore be recognized that the supposed reasons for the rule are anything but convincing, and as touching the art of the law, that the English rule presents an esthetic discord in that it does not apply to the case of a joint and several contract obligation. It is not too much to say that the court was "between the devil and the deep sea." To go with the established rule would defeat a just claim by an unfair and unnecessary technicality. To overrule the previous cases would appear to undermine the foundations of case law. The court attempted, as we have pointed out, to avoid the dilemma by an eloquent appeal to natural law.

Yet the course pursued must be commended as having reached the right result. The operating tools may have been unfit, but the patient lived. But we cannot resist the belief that the court neglected an unusual opportunity. The case is striking in squarely presenting a necessity of choice between *stare decisis* and a just solution. We regret that the court did not have the fortitude to accept the only real issue and accomplish the same result attained by an outspoken denial of the rule of *stare decisis*. There is not wanting an Indiana precedent for such a course. In *Jasper County v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58, the Supreme Court said:

"If a decision or a series of decisions are clearly incorrect . . . and no injurious results would follow from their overthrow, and especially if they were injurious or unjust in their operation, it is the duty of the court to overrule such cases."

The rule of *stare decisis* is judge-made and the judge can unmake it. It does not differ in any way in force or authority from any other rule of law made by the courts. It goes to the method of employing precedent, and in that sense is fundamental, or, as it were, constitutional; but its fountain is no higher than the authority of the courts. The courts may, therefore, amend this article of their constitution at will. (Cf. Lile, "Views on the rule of *Stare Decisis*," IV Va. Law Rev. 95.) The policy of the matter is another question. It is conceivable that an unjust and oppressive result in an individual case may be justified for the sake of security of the interests of other members of society but it is not conceivable that any member of society can legitimately claim an interest in a legal rule which permits fraud or deceit, or that policy can justify the maintenance of such a rule.

A. K.

**PUBLIC HIGHWAYS—VACATION—RIGHTS OF ABUTTERS—INJUNCTION.**—In the case of *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18, it was determined that a municipality might vacate a street regardless of injury to another, abutting owner especially affected thereby, if the public interests so required, and, upon the question whether the public interest was such as to justify such invasion of private rights, it appeared, that the action of the municipality would be conclusive; provided, only, the municipality was in such vacation, acting free from improper motives and not acting solely on behalf of private interests: (269 Ill. 405-414-415). The idea of the court was not that a property owner actually injured thereby in some way different from the public, would be left without redress, but rather that he must accept such compensation as the law allowed for the injury to his property, and could not by injunction proceedings, interfere with the paramount interests of the public. Following out that action, the court suggests that a different situation is presented where the vacation is by a proprietor of a plat under chapter 109 (Hurd's R. S., 1913, p. 1854), for there the vacation must be joined in by the proprietor and all the owners of lots in the plat, that would be affected thereby.

E. M. L.

# BOOKS AND PERIODICALS

## BOOK REVIEWS

**MODERN FRENCH LEGAL PHILOSOPHY.** By A. Fouillée, J. Charmont, L. Duguit, and R. Demogue. *Modern Legal Philosophy Series: Vol. VII.* Boston: Boston Book Company, 1916. Pp. ixvi, 578.

This book presents the legal philosophy of modern France as portrayed by Alfred Fouillée, Joseph Charmont, Léon Duguit, and René Demogue, a portion of whose writings have been admirably translated by Mrs. Franklin W. Scott and Joseph P. Chamberlain. Perhaps no more timely work has ever been published. It was designed primarily for lawyers and law students. It should be read by all thoughtful men and women.

We are in the midst of a great social revolution. In America today we no longer bow to the traditions of the past nor do we accept the leadership of the past. Not only are the native born beginning to question the foundations of government, but those foundations must be presented and defended and made satisfactory to the thirty millions of our population, who are themselves either foreign born or whose parents were such. The English and American law is based on precedents, and those precedents were largely laid in a sea-girt isle, in an age of restricted communication, and in an age of class interest. The great industrial revolutions both in England and America have stretched the precedents of the past to the breaking limit. Neither autocracy, feudalism, socialism, nor the laissez faire principles of our immediate fathers are adequate to our modern needs.

Above all there is the eternal discontent of democracy. Men are no longer willing to follow the mandates of the Episcopal catechism and "to do their duty in that sphere of life in which it has pleased God to call them." They are striving for entrance into other spheres and other domains. Familiarity has bred contempt. The mud-slinging of our frequent elections, the cartooning of our highest public officials, and the incompetency and often dishonesty of men whom we ourselves have elected merely because "they could shout long and loudly at the hustings," have occasioned us to lose all respect for authority and for government.

George Washington and Alexander Hamilton maintained that the colonists were only insisting upon the already established rights of Englishmen. Millions of our people are wondering whether those rights are all that men should have. They have been trained in other schools of thought and in other philosophies, and insist that the patriot fathers were not their fathers; that all wisdom was not represented either at Faneuil Hall or at Philadelphia. We are questioning our foundations. Legal decisions are no longer revered, but are the occasion of heated discussions at the hustings. The paramount need of the age is that we should think; that

information should be generally disseminated, and that not only our judges and lawyers, who are the natural leaders, should read something more than that which is to be found in the law books, but that the people themselves should study the foundations of government and above all come to realize wherein true liberty really exists.

The book before us is a fitting sequel to the memorable meeting of the American Bar Association, which was held in Montreal in 1913. That meeting was of world-wide significance. At it were laid the foundations of a world-wide democratic legal entente. At it were represented four great nations (for, according to Lord Haldane himself, Canada is a nation), where the democratic ideal is paramount; where liberty is the watch-word, and where, though the state is revered and revered, the idea of the state is builded upon the idea of the welfare of the individual, and governments are deemed to have been made for man and not man for governments.

That meeting was above all suggestive of a world-wide reign of law. On the platform was the great Chief Justice of America, the exponent of a judiciary of enormous power, but of a judiciary which claims merely to interpret, and whose oath of office commands it to obey the written law.

There was Lord Haldane, the keeper of the king's conscience, the lord high chancellor of England, who represented the splendor of a king, but a country also where even the king is subservient to an established law.

There was Premier Borden of Canada, the representative of a great nation, which, like ours, has offered an asylum to the people of the world; which, like ours, is working out the great problem of a cosmopolitan democratic government under the law.

There was Maitre Labori of France, who represented the integrity of the French Bar, the idealistic French conception of liberty, and the doctrine that human rights under the law of the land are paramount to race hatred and to military control.

All of these nations though founded on law, though insisting on personal liberty, are moving upward and forward in the great evolution of the age and all are asking themselves the all-controlling question, wherein does true liberty really exist?

Not only is the book opportune for this reason, but at no time in the history of America were the problems of the judge as difficult as they are today. There is a popular belief that somehow or other the law is inadequate. The growth of the age, the problems of an undeveloped continent, the demands of a surging democracy, the annihilation of space by rapid means of communication of both things and ideas have tested the old law and the old precedents to their limit. Everywhere there is a discontent and a tendency towards criticism. Everywhere is the charge made that the letter of the law killeth. The legislatures and constitutional conventions cannot keep up with the increasing demands of our industrial and social growth. On the one side the judge is criticised for supporting the constitutions—on the other hand for throwing them down.

As a people we need to take an account of stock. We need to ask ourselves what we really want. We need to understand the limitations and the boundaries of law. We need to study government, not as a scaffolding or as a structure, but as a foundation for human destinies and human lives.

In such an age nothing could be more appropriate than that we should have presented to us the thoughts and philosophies of Frenchmen, whose problems have been ours, whose yearning for democracy has been the same, whose ideal is essentially social and humanitarian, whose basic conception has been an idealistic theory of individual liberty, but whose men and women know how to die for the parent state.

It is not in the province of a review of this kind, and of a book, which, with the exception of some excellent prefaces, merely contains a translation of the writings of great French legal philosophers, to discuss those writings themselves. The critics of the world have already done that for us. It is sufficient for us to merely call attention to the chapter headings of Fouillée, namely, "The Psychology of Peoples and the Philosophy of Law," "The French Spirit and the Idea of Law," "Antecedents of the Philosophy of Law in France," "The Idea of Law in the French Philosophy of the 1800s," "Criticism of the Traditional Idea of Law Based on Free Will," "The True Side of Naturalism," "The True Side of Idealism," "Scientific Reconciliation of Naturalism and Idealism," "Metaphysical Hypotheses Concerning the Ultimate Basis of Law," "The Agreement of the Theory of Ideal Right with the Force and Interest Theories," and "The Future Idea of Right;" to the chapters of Joseph Charmont, which deal with the "Sociological or Positivist School," "Legal Idealism," "Solidarism," "Pragmatism," "Natural Law," "Free Scientific Research," "Objective Law," and "The Conflicts Between Law and the Individual Conscience;" to the chapters of Léon Duguit, which deal with the "Misconceptions of the State and of the Law," "Social Solidarity," "The Rule of Law," "The State and Law;" to the chapters of René Demogue, which deal with "The Notion of Law," "Security," "Evolution and Security," "Economy of time and Activity," "Justice," "Equality," "Liberty," "Solidarism and the Apportionment of Losses," "The Notion of General Interest," "Future Interest," and "Moral Interest."

These chapter headings suggest the rich mines of thought, and the lawyer of today who fails to explore them realizes but little the scope of his profession, and has no conception of the culture which should be his. The introductions, too, by the editorial committee, Mr. Arthur W. Spencer, Chief Justice John B. Winslow and Mr. F. P. Walton, are well worth reading, and furnish a fitting setting for the work as a whole.

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Bismarck, North Dakota.

ABRAHAM LINCOLN: THE LAWYER-STATESMAN. By John T. Richards. Boston: Houghton Mifflin Company, 1916. Pp. vii, 260.

On account of Lincoln's exalted position as president, and his

activities as a politician and statesman, he has not been generally accorded his proper rank as one of the leading lawyers of his time. It is largely for the purpose of correcting this erroneous impression as to Lincoln's standing as a lawyer, that Mr. John T. Richards has written this book.

As the author states in the preface, it is not intended as a biography but "only as a presentation of the results of an investigation into the record of Abraham Lincoln as a lawyer, his views upon the subjects of universal suffrage, and the reconstruction of the Confederate state governments at the close of the Civil War and his attitude toward the judiciary."

The book is not a compilation of material taken from other biographies, but the author has gone to original sources and made a careful examination of the records and pleadings in the state courts of Illinois and the United States courts. As a result of this investigation, he finds that Lincoln appeared as counsel in the Supreme Court of Illinois in 175 cases, in 51 of which he appeared alone as counsel; that of these 51 cases, 31 were decided by the Supreme Court in his favor; that of the remaining 124 cases in which he appeared as associate counsel, 65 of them were decided in favor of his clients.

While the records of the circuit and district courts of the United States, including all of the records down to 1855, and all of the records in the northern district of Illinois down to 1871, were destroyed by the Chicago fire, so that the author was unable to ascertain the number of cases in which Lincoln appeared in the United States courts, yet the docket for the Circuit Court of the United States for the southern district of Illinois, shows that Lincoln appeared as counsel for the plaintiff in that court in 60 cases during the period from 1855 to 1860. That docket does not show the names of the attorneys for the defendants but the author thinks there is sufficient evidence to warrant the conclusion that Lincoln appeared for the defendant in the United States Circuit Court quite as often as he did for the plaintiff. It also appears that during the same period Lincoln appeared frequently in the District Court of the United States in defense of criminal prosecutions brought by the government, and in admiralty cases. Mr. Richards, from his investigation, thinks it is fair to assume that, from the number of cases Lincoln had in the United States Circuit and District Courts for the southern district of Illinois, he had an even larger experience in the United States courts for the northern district of Illinois. He also had two cases in the Supreme Court of the United States.

The author's examination of the pleadings still on file in the state and United States courts led him to the conclusion that Herndon's statement in his "Life of Lincoln" that he (Lincoln) did little of the technical work of the firm, is not borne out by the facts, for the records show that most of the pleadings, "with scarcely an exception," signed by the firm name of Lincoln and Herndon, are in the handwriting of Mr. Lincoln.

One of the best ways to ascertain a lawyer's standing at the

bar is to obtain the opinions of his contemporaries. Mr. Richards quotes Stephen A. Douglas, Leonard Swett, Judge David Davis, Judge Thomas Drummond, and Judges Sidney Breese and John D. Caton of the Illinois Supreme Court who all agreed that Mr. Lincoln was one of the ablest lawyers of his time.

A lawyer may also be judged somewhat by the character of his clients. While it is true that Lincoln tried a great many comparatively insignificant cases for clients of very moderate means, yet he was employed in some very celebrated cases and represented clients who were able to secure the best legal talent.

The author discusses at some length Lincoln's connection with the case of *Hurd v. Rock Island Bridge Co.* which was tried in the federal court in Chicago, before Justice McLean, then a justice of the United States Supreme Court. Mr. Lincoln appeared for the Bridge Company with Norman B. Judd of Chicago, and Joseph Knox of Rock Island. The plaintiff was represented by H. M. Wead of Peoria, T. D. Lincoln of Cincinnati, and Corydon D. Beckwith of Chicago, who was later counsel for the Chicago & Alton Railroad, and afterwards a judge of the Supreme Court of Illinois.

This case was tried in September, 1857, and attracted widespread attention both because of the importance of the question involved and the eminence of counsel. It was a suit to recover damages sustained by the owners of a steamboat, the "Effie Afton," in consequence of the boat having been drawn by the current of the Mississippi River against a pier of the Rock Island bridge across the Mississippi, and it was hoped to recover such an amount of damages as to make the maintenance of that and other bridges across navigable streams unprofitable to the railroad companies, and thus compel them to unload their freight on the banks of the rivers and transfer it across by ferrys and reload for shipment to the point of destination. This, of course, would have made railroad transportation prohibitive and continued the supremacy of the steamboat monopoly. At that time there was bitter rivalry between St. Louis, then a city of 150,000, and Chicago with its then population of 100,000.

The author quotes from the press of Chicago, St. Louis, and Cincinnati to show how public interest was aroused over this case. As the case was tried prior to the debates with Douglas, and before Lincoln had acquired a wide reputation, he must have been employed as counsel by the Bridge Company because of his standing and ability as a lawyer and this is emphasized by the fact that he was accorded the privilege of making the closing argument to the jury on behalf of the defendant.

Mr. Richards also considers at some length the famous case of *Illinois Central Railroad Co. v. McLean County*, where Lincoln represented the Railroad Company. Lincoln later brought suit to recover his fees from the Illinois Central, but the author refers to a pamphlet prepared by the Railroad Company to show that there was no ill feeling between the Company and Mr. Lincoln at

that time. The fact that Lincoln afterwards represented the Illinois Central Railroad Company in the case of the *State of Illinois v. Illinois Central R. R. Co.* in 1860, shows quite conclusively that the officials of the Illinois Central considered Mr. Lincoln to be one of the ablest lawyers in Illinois at that time.

The book also gives an account of Mr. Lincoln's connection with the case of *McCormick v. Manny* which was a patent infringement case tried in Cincinnati, where Edwin M. Stanton, later Secretary of War under Lincoln, George Harding of Philadelphia and Mr. Lincoln were retained for the defendants. The author refers to Ida Tarbell's treatment of this case in her recent biography, where she gives an account of the matter as furnished by Mr. Harding, which Mr. Richards claims "was so prepared as to relieve those distinguished lawyers [Stanton and Harding] as far as possible from criticism."

The author then gives an account of this case and of Stanton's treatment of Lincoln as related to him by the late John Bigelow, who was an intimate friend of Harding's and to whom Harding had related the incident. This shows that Stanton insisted that Lincoln should not make any argument in the case, and that both Harding and Stanton absolutely ignored Lincoln. That Lincoln after such treatment appointed Stanton to his cabinet, shows his magnanimous nature and lofty patriotism, and the fact that Stanton became one of Lincoln's most devoted admirers shows that he had done Lincoln a great injustice in his early opinion of him.

Mr. Richards discusses at some length the celebrated Armstrong murder trial in which Lincoln defended Duff Armstrong for killing one Metzker with a slungshot on the night of August 29, 1857, and refutes conclusively the accusation that has sometimes been made to the effect that Lincoln substituted an almanac of an earlier date to prove that there was no moon on the night in question.

He also refers to other important cases in which Lincoln appeared as counsel and concludes from his examination of the records "that in the number and importance of the cases which he tried, he stood second to no lawyer of that period."

In his chapter on the "Lawyer President," the author shows that Lincoln's experience as a lawyer was a great advantage to him as president; that his knowledge of the common law and the history of Anglo-Saxon liberty and the principles on which the national government was founded, all helped him in the difficult problems that confronted him as president; "that the lawyer was not superseded by the executive, but that both were combined in the person of the president." He shows that Lincoln had great regard for the limitations placed upon the executive by the constitution and did not attempt to take upon himself the exercise of powers conferred on co-ordinate branches of the government as some recent executives have done.

In regard to the claim sometimes made that Lincoln was in favor of woman suffrage, the author shows that this claim is based



entirely on a single sentence in a statement issued by Lincoln in 1836, when he was a candidate for the legislature. It should be borne in mind that at that time, the constitution of Illinois contained no provision restricting the right of suffrage. Lincoln said: "I go for all sharing the privileges of the government who assist in bearing the burdens. Consequently, I go for admitting all whites to the right of suffrage *who pay taxes* or bear arms (by no means excluding females)."

He probably believed that all residents of the state were entitled to vote after residing in the state six months, as that was the only limitation then fixed by law. This is the only expression Lincoln ever made on the subject. It was made when he was only 27 years old and he probably gave no serious consideration to the subject. This was about twelve years before the woman suffrage movement was inaugurated by Elizabeth Cady Stanton and Lucretia Mott, and, as the author points out, this movement had reached considerable proportions by 1850, but there is no evidence that Lincoln supported it. The author therefore concludes:

"While there is not sufficient evidence to justify the conclusion that Mr. Lincoln did not favor woman suffrage, it is equally true that proof that he was a believer in such extension of the elective franchise is also lacking."

The author shows that he was not in favor of amending the constitution, except where there was an urgent necessity. While he favored the thirteenth amendment of the constitution, there is no evidence that he favored the fourteenth and fifteenth amendments, but there is abundant evidence that he deemed it unwise to confer the elective franchise on the great mass of slaves who at the close of the war had no idea of the duties of citizenship, but he favored giving them the franchise as soon as they became fitted for it by education. He quotes from Lincoln's public addresses to justify this conclusion.

Lincoln believed that the question of suffrage should be left to the respective states. Whether he would have taken that position today as to the question of woman suffrage is not discussed by the author.

Considerable space is devoted to Lincoln's views as to reconstruction, and while the author finds that Lincoln's plan for reconstruction was in substantial accord with that of his successor, President Johnson, and that he would not have approved the system that was subsequently known as "carpet bag government," yet that Lincoln would probably not have had any serious trouble with Congress on that subject, as Johnson did, because Lincoln would not have been apt to veto any act of Congress, even if contrary to his views, unless he believed the act to be a clear violation of the constitution. To sustain this view, the author shows that Lincoln was opposed to the veto except in very special and clear cases, and points out that he only exercised the veto power on two occasions while President. He believes that if the policies advocated by Johnson had been recommended by Lincoln, they would have had

the hearty support of the nation, because of the people's trust in his wisdom and profound statesmanship.

In the chapter entitled "Criticism of the Judiciary," the author discusses Lincoln's criticism of the Supreme Court in the *Dred Scott* case, which is often referred to in recent years as an indication that Lincoln did not have high regard for judicial authority, in a case where it ran counter to the popular will. Mr. Richards, however, maintains that no one ever had a greater respect for judicial authority than Mr. Lincoln. He admits that Lincoln did severely criticize the judges who concurred in the majority opinion of the court, and that, while he admitted the binding force of this opinion in the particular case in which it was rendered, he insisted that it should not be regarded as a final settlement of the questions involved, and therefore "should not be followed as a rule of political action." But the author shows that there were many circumstances surrounding the case which justified Lincoln in believing that the opinion was brought about by "concert of action" between the justices, the executive and Congress, in an attempt to settle a purely political question about which the country was greatly agitated, and that the decision was based on a false assumption by the judges as to the historical facts. He quotes from two of Lincoln's speeches in 1857 and 1858 in which Lincoln analyzes the opinion and shows the false assumption as to historical facts.

Lincoln's chief attack was against that part of the opinion, which declared that Congress had no power under the constitution to prohibit slavery in a territory of the United States, and he showed that such a construction was contrary to that placed upon the constitution by Congress and the executives. Mr. Richards very pertinently calls attention to the fact that, in his speeches on this subject, Mr. Lincoln never mentioned the provision contained in the fourth article of the constitution which declares that "Congress shall have power to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States," as embodying a grant of power to Congress to control slavery therein. This clause alone, the author considers, as sufficient to authorize Congress to exclude slavery from a territory.

He quotes extensively from Lincoln's speeches to show that he never favored any policy that would curtail in the slightest degree the independence of the judiciary.

The concluding chapter is devoted to Lincoln as an orator and after referring to several of Lincoln's most famous orations, he concludes that Lincoln "was one of the foremost orators of any age." Some "Gems of Thought from Lincoln" are inserted after the closing chapter, and the appendix contains a list of Lincoln's cases in the Supreme Court of Illinois with a brief synopsis of the facts in each case.

Other writers have discussed fully Lincoln's views as to slavery and reconstruction and his acts as President, but this is the most thorough and exhaustive work that treats of Lincoln as a lawyer. It is a valuable addition to Lincolniana, and its reading is com-

mended to laymen as well as lawyers. Its wide circulation will do much to remove the false impression as to Lincoln's ability as a lawyer, and to restore him to his rightful place among the "truly great lawyers of his generation."

Chicago.

JAMES S. HANDY.

CASES ON THE LAW OF PUBLIC SERVICE. By Charles K. Burdick. Boston: Little, Brown, and Company, 1916. Pp. xiii, 544.

This collection of cases is preceded by a table of contents showing the chapter headings and a topical analysis of certain chapters, and by a table of cases. It is followed by an appendix containing reprints of the act to regulate commerce, as amended, and the Elkins law, and also by an index. The last two features are somewhat unusual in a case book for academic use. The 50 pages devoted to the reprinting of the federal statutes might have been used to better advantage in extending or amplifying the list of illustrative cases. The index is sufficiently detailed to serve as a guide to the general subject-matter of the cases. It should be useful to the student in correlating the several cases.

The law of public service has developed with sufficient rapidity since the publication of Wyman's collection of cases to justify this new book. The Public Service Commission was just beginning to gain recognition when Wyman was introduced to the academic world. It is fitting to find in Burdick's collection a number of commission decisions dealing with phases of the valuation question. Thus, we find on page 301, an extract from the opinion of chairman Stevens in the *Buffalo General Electric case* on the subject of franchise value; and an extract from the *Antigo Water Co.* decision of the Wisconsin commission on the subject of going value. Commissioner Maltbie's illuminating discussion of the treatment of appreciation in land values as found in the *Queens Borough Gas & Electric Co. case* is found on page 322. The selection from commission decisions might have been amplified to advantage.

It is somewhat disappointing to find omitted from the section devoted to the capital on which net returns are to be computed in determining the validity of rate-making, some of the recent decisions of the Supreme Court of the United States, such as the *Cedar Rapids* and *Des Moines gas cases*, which appear to mark a definite turning point in the judicial treatment of the valuation question. On the other hand, the *Minnesota rate case* is used to illustrate at least two points, and the recently decided *North Dakota rate case* is also employed.

The arrangement of chapters and topics falls within conventional lines. For the most part, the cases are the leading cases long recognized as such. The important exception, of course, is in the chapter devoted to rates, where much of the material is new. This is the branch of public service law which has received the greatest attention in the last few years, and which has undergone the most rapid development. We are inclined to feel that Prof. Burdick's collection would have been more valuable if it had devoted less

space to the conventional subjects, and more to the active problems of regulation.

A feature of the collection which commends itself to us, is the frequent addition to the text of the cases, of explanatory footnotes in which attention is called to other cases illustrating the same points, and to variations in the views expressed by different courts. This feature makes of the volume something more than a bare collection of cases, and for this reason, in the opinion of the reviewer, it is more valuable for academic purposes than the usual case book. Every case necessarily has a setting which is really a part of the case itself. The case book can well afford to indicate the general outline of that setting, thereby relieving the instructor of a duty more or less routine in nature, and enabling him to proceed without delay to the consideration of the principles illustrated.

W. D. K.

THE GIST OF REAL PROPERTY LAW. By Harold G. Aron. New York: Writers' Publishing Co., 1916. Pp. xiii, 264.

This is a student's handbook on real property. It seems to be an attempt to state the leading principles of real property law in summary form, with special reference to the present law of New York. The student will probably find some of the shorter English works more convenient for a survey, such for instance as Leake's or Challis's; and the volume will hardly take the place of Tiffany's among students of modern American law. Since the recent publication of Reeves's treatise dealing particularly with the legislation and special rules of New York, there seems to be little need for this additional work, and the volume cannot be more than an aid in review to students. To practitioners it has little value, though the appendix contains citations which the New York lawyer may find convenient. In schools where the lecture system still obtains, students will welcome this summary because of its succinctness and comparative accuracy.

University of Missouri.

MANLEY O. HUDSON.

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# ILLINOIS STATE BAR ASSOCIATION NOTES

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## DISTRICT MEETINGS

By R. ALLAN STEPHENS<sup>1</sup>

For several years the Illinois State Bar Association has been endeavoring to interest the local city and county bar associations in its work. Through its committee on organization, the state association has tried various ways of bringing the local associations into closer communication with each other. In 1914, an effort was made to organize a state federation of local bar associations, and as a result of considerable effort on the part of the committee on organization, the counties sent their representatives to the meeting held in connection with the annual meeting of the state bar association and perfected the state organization. During 1915 and the year following, efforts were made to organize the local associations, according to Supreme Court judicial districts or seven district organizations throughout the state. The committee succeeded in organizing such federations in the third and sixth districts, and within the present year, unless plans fail, meetings of the state association will be held in every Supreme Court district.

Instead of asking the members of the bar to come to the annual meeting at some central point, the officers of the state association are making trips to each one of the districts. Already these meetings have been held in the first, second and seventh districts; and the remaining meetings will be held at Monmouth, December 16; Peoria, January 13; Freeport, January 20, and Springfield, February 4.

The meetings opened with the first district at East St. Louis November 11. The excitement of the national election had hardly subsided, but in spite of this eight counties were represented by over forty lawyers, and the federation for the first district was organized. The officers are: Albert Watson, Esq., of Mt. Vernon,

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Associate Editor of ILLINOIS LAW REVIEW, and Secretary of Illinois State Bar Association.

president; Charles E. Combe, Esq., of Harrisburg, secretary; and E. C. Kramer, Esq., of East St. Louis, member of the state executive committee.

With a view to determining whether there is any uniformity of opinion among attorneys throughout the state, the board of governors of the State Bar Association is submitting three proposed bills for discussion at the various district meetings. The bill proposing to prohibit corporations assumming to practice law, was understood to be looked upon with disfavor by the down-state lawyers as being a city measure, but this meeting developed a very strong sentiment in favor of the bill. The proposition that our present law be amended so as to make a summons returnable on rule of court and permitting services by other than the sheriff, was opposed by every bar association but one.

The second supreme court district extends clear across the state and the officers of the State Bar Association felt that the Vandalia meeting would be the smallest one of the series. Much to their surprise they found when they arrived at the old original capitol of the state, thirteen of the twenty-one counties represented; the counties not represented being those so far away that train connections made attendance impracticable. Mr. Justice Farmer was present and over fifty attorneys sat down at the luncheon. The district organization was soon organized with Charles Burton, Esq., of Edwardsville as president; Elbert Vandervort, Esq., of Salem, as vice-president; Walter E. Reinhart, Esq., of Effingham as secretary; Leslie J. Taylor, Esq., of Taylorville as treasurer; and Noah M. Tohill, Esq., of Lawrenceville as member of state executive committee. Again the attorneys went on record as opposed to any change in present service and return of summons, and approved the bill prohibiting corporations from assuming to practice law; although they preferred that the bill should go further and prohibit laymen from drawing wills and other legal papers; for while the country lawyer is not very much affected by the corporation assuming to practice law, he feels the effects of the notary public or justice of peace who infringes upon his business.

At the Vandalia meeting, the present condition of our law with reference to the rule in Shelley's case and the acceleration of contingent remainders was discussed, with the result that a motion was unanimously passed requesting the state association to use its efforts to obtain the repeal of such rules by the legislature.

On December 9, the meeting for the seventh district, was held at Kankakee. It consisted of an afternoon session and an evening dinner. Five of six counties in the district were represented. W. R. Hunter, Esq., of Kankakee was elected president; Frederick A. Brown, Esq., of Chicago, vice-president; John H. Garnsey, Esq., of Joliet, secretary; and the president was authorized to represent the district on the state executive committee. While most of the lawyers in attendance were attorneys from the larger towns there was little difference in the opinions expressed by them, and those of the other districts comprising the rural committees. Again,

amendments to our practice act affecting summons were not approved, while all were willing to condemn corporations assuming to practice law. At the dinner the speakers were T. F. Donovan of Joliet on "Legal Light," A. L. Granger of Kankakee on "Reforming the Lawyers," Charles W. Hadley of Wheaton on "The Trials of a State's Attorney," President Albert D. Early of Rockford on "The State Bar Association," and Nathan William MacChesney of Chicago on "Compulsory Arbitration." There was not a suggestion of a dry spot in any of the speeches and the listeners left the meeting with assurance that the organization in the seventh district was a success.

If the present ratio of representation is carried out through the remaining districts, the last of the district meetings will bring the State Bar Association into personal touch with the representatives of over one-half of the counties of the state. The Springfield meeting is expected to be the last and largest one of all the meetings. It will be held while the legislature is in session. The lawyers from the entire state will be invited to attend, and plans have already been laid for a dinner with a distinguished speaker.



# ILLINOIS LAW REVIEW

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## A BIBLIOGRAPHY OF PROCEDURAL REFORM INCLUDING ORGAN- IZATION OF COURTS<sup>1</sup>

By ROSCOE POUND<sup>2</sup>

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# THREE GENERATIONS OF ROMANCE AND LITIGATION: THE CELEBRATED GAINES WILL CASES<sup>1</sup>

BY WALTER S. HOLDEN<sup>2</sup>

Among the curiosities of New Orleans, which all Northerners visit, is St. Louis Cemetery No. 1. It occupies less than a city block. The tombs are built above ground, and are six to ten feet high. They are arranged in regular order, side by side, facing straight and narrow lanes, running the length of the cemetery. It is the oldest of the cemeteries, and the city has done little or nothing to arrest the ravages of time and decay. Many of the tombs have fallen to pieces in whole or in part, revealing their gruesome contents. At one end is a large hollow in which the bones of disinterred bodies have been cast. In this cemetery lie the mortal remains of Daniel Clark, the central figure of this paper.

Daniel Clark was born in County Sligo, Ireland, about the year 1766. He was educated at Eton and other English schools, and before reaching the age of twenty-one, came to New Orleans upon the invitation of a rich uncle, whose property he inherited at the latter's death, in 1799. Clark became a leader in the social, business and political life of the community. He is described as a man of great personal pride and social ambition, and of strong intellect. He was enterprising, of dominating character, and of commanding influence. His pecuniary integrity was unquestioned. To him, more than to anyone else, is attributed the acquisition by the United States of Louisiana. He had been United States Consul at New Orleans while it was under the dominion of Spain, and was the first representative of the Territory of Louisiana in Congress. In 1808, he was the chief witness in the court martial of Gen. James Wilkinson, the intriguing and unscrupulous accomplice of Aaron Burr in the conspiracy to cause a secession of the southwestern part of our country. In 1807, he engaged in a duel with Governor Claiborne, in which the latter was seriously wounded.

Clark died at New Orleans August 16, 1813, at the age of 48, and, as was commonly reputed, a bachelor. No will but one dated in 1811 was found. This left his property to his mother, Mary Clark, who was living at Germantown, Pa. It was an olographic will, naming his partners, Richard Relf and Beverly Chew his executors. This will was presented to Judge Pitot, in the second District Court

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1. A paper read before the Law Club of Chicago on May 28, 1916.  
2. Of the Chicago Bar.

of the Parish of Orleans, the Court of Probate, on August 17, 1813. The next day, Chevalier de la Croix, an intimate friend of Clark's, presented a petition to said court, saying he had strong reasons for believing that decedent had executed a later will, and praying that every notary public of the city be cited into court, to testify to whether copies of any such will had been filed or deposited in their respective offices. The order was entered, the notaries appeared, but no such will was shown to have been deposited with any of them. The will of 1811 was thereupon probated, and in the course of a few years Relf and Chew, the executors, sold off decedent's entire estate, then said to be valued at about one million dollars, most of it real estate in the City of New Orleans.

Soon after coming to New Orleans, Clark had become intimate with a Frenchman by the name of Jerome Des Granges. In 1794, Des Granges had married a French girl named Zulime de Carriere, then only 13 years of age. She is said to have been a girl of remarkable beauty, and we think the story of her life will justify us in saying she must also have been extremely voluptuous in form, and passionate in character and disposition. Des Granges kept a small confectionary shop where liquors and cakes were served. Zulime stood behind the counter and waited on customers, and it is fairly inferable that the trade of the shop did not suffer thereby. Clark became a frequent visitor at the home of Des Granges and Zulime. In the spring of 1801, Des Granges went to France for the purpose of recovering some property in which his wife and her two sisters, Madame Despau and Madame Caillavet were interested. Des Granges wrote to Clark from France, sending a package for Clark to deliver to Zulime, and requesting him to look out for her if she were in need of help or advice. Clark followed these instructions to the letter. He was much in Zulime's society, and while the husband was still in France, she was found to be pregnant. Clark sent her to Philadelphia, with letters of introduction to his partner, Daniel W. Coxe, a resident of Philadelphia, and a person of distinguished local standing. These letters informed Coxe that the pregnancy was by him, Clark, and requested that she be properly cared for. She finally gave birth to a girl baby who was named Caroline. The baby was placed by Coxe in the care of a nurse, and later was given over to a family in the country, where she was reared and educated at the expense of Clark during his life time. She grew to womanhood, and was married respectably to a man named Barnes. After the birth of Caroline, Zulime returned to New Orleans, and her husband Des Granges, so far as appears, never knew of the occurrence.

In the fall of 1802, Des Granges returned to New Orleans, and brought with him a seamstress from France. He was at once incarcerated on the charge of bigamy. It was charged not only that he was married to the seamstress, but that before his marriage to Zulime, he had married in New York a woman by the name of Barbara Orci. Upon the trial, no attempt seems to have been made to prove a marriage to the seamstress, who said she came to this country the better to make a living. Both Des Granges and Barbara Orci denied that they were married. Zulime testified that she had heard of the rumors and charges that her husband had a former wife living; that the year before she had gone to Philadelphia and New York to investigate the charges (which we know was not the object of her trip), and became satisfied that the charges were not true. There was neither a conviction nor an acquittal, the court merely suspended the proceedings with power to prosecute them thereafter, if necessary. The costs of the proceeding were taxed against Des Granges, and he was set at liberty. He at once fled, and did not reappear in New Orleans until 1805. The question as to whether Des Granges had a living wife when he married Zulime is a matter of the greatest concern, for its solution determines whether or not the subsequent marriage of Daniel Clark and Zulime, which it was claimed took place in Philadelphia in 1802 or 1803, was valid, and whether a child thereafter born to Clark and Zulime was legitimate.

The story of this marriage of Clark and Zulime, as told by her sister, Madame Despau, who claimed to have been present, is as follows: When Zulime heard rumors of Des Granges' former marriage, which it was said he had confessed, she separated from him. Daniel Clark then proposed marriage to her. It was deemed necessary that positive proof of the prior marriage of Des Granges be first obtained. To obtain this proof, Zulime, in 1802 or 1803, went to New York with her sister, Madame Despau, and visited the Catholic Church, where Des Granges was said to have been married. It was found that the registry of marriages had been destroyed. Clark followed them to New York. They were informed that a Mr. Gardette of Philadelphia had been a witness to the wedding ceremony. They proceeded to Philadelphia, and interviewed Gardette, who confirmed what they had heard. Fully satisfied now that Des Granges was a married man in 1794, when she was married to him, and that therefore her marriage was void, and Daniel Clark pressing his suit, she gave her consent. Clark and Zulime were then married in Philadelphia by a Catholic Priest, Madame Despau



being a witness. Clark said that it would be necessary for them to keep the marriage a secret until there was a judicial annulment of the marriage of Zulime and Des Granges. Clark, a man of great pride, felt that to announce the marriage would create a scandal, and to the date of his death the marriage was never promulgated. They returned to New Orleans, and Clark settled her in an elegant home, in which she lived with her sister. He used to take tea with them every evening. Among his friends, he was reputed a bachelor. New Orleans was at that time a city of about eight thousand inhabitants, and as may well be imagined, the moral standards were low. Clark, while a man of honor, conformed to the more or less common practices, and was known to have several mistresses. One witness says, "When Clark saw a pretty woman, he fell in love with her."

In 1805, Des Granges returned to New Orleans, and suit was instituted by Zulime for alimony. A decree was entered in her favor, and Des Granges at once disappeared and never was seen or heard of again. In 1806, she sued him for divorce, the suit being brought in her maiden name, Zulime de Carriere. The petition, having been lost from the court files, it is not certain what charge it contained, but it is probable the prayer was for a decree nullifying the marriage, on account of Des Granges' prior marriage. At any rate, a decree was granted for the complainant.

In 1806, Zulime gave birth to another daughter in New Orleans. Colonel Davis, a brother-in-law of Boisfontaine, who managed some of Clark's plantations, took charge of the infant. She was suckled by a Mrs. Harper, a niece of Colonel Davis. Mrs. Davis, having no child of her own, and becoming attached to the baby, she and her husband determined to keep her until her parents might claim her, and gave her the name Myra.

In 1806, Clark was sent to Congress. An estrangement took place between himself and Zulime, the exact cause of which is uncertain. It was said on the one hand that he had heard stories about her that caused him to suspect her fidelity. She doubtless was impatient because he persisted in postponing the promulgation of their marriage. It is certain, however, that Clark was making eyes at another beauty, a Miss Caton of Baltimore, and the report reached Zulime that he was engaged to marry her. Wishing to learn the truth as to this, Zulime and her sister Madame Despau went north. They first went to Philadelphia to get the proof of her own marriage to Clark. There she learned that the priest who had married them had gone to Ireland. They then sent for Clark's partner, Coxe, and

told him of the rumor they had heard. He answered that it was true that Clark was engaged to marry the Baltimore girl. He also said that Zulime would be unable to establish her marriage to Clark if he were disposed to contest it. He sent to her a lawyer who told her she could never prove her marriage to Clark. Satisfied with this, she married Gardette, the man who had been a witness at the first marriage of Des Granges. So far as the record shows, she had never been intimately acquainted with this gentleman. It would appear that the sanctity of the marriage relation was not deeply rooted in the conscience of Zulime. She lived for several years with her new husband in Philadelphia, and then moved with him to France. Upon his death in 1831, she returned with his and her three children to New Orleans, where she appears to have lived a quiet, respectable life until her death in 1853.

Returning now to Myra, the last child born of Zulime and Clark in 1806, it will be recalled that she was placed in charge of Colonel Davis and wife. In 1812, Davis moved to Philadelphia, taking his wife and Myra. The child was brought up by them, and was known only as Myra Davis.

In 1830, Davis, then a member of the Pennsylvania legislature, wrote home for certain papers. Myra, in searching for them, accidentally came upon some letters which intimated that she was not his daughter, but that her father was one Daniel Clark of New Orleans. Upon Davis' return home, he disclosed to her more fully the circumstances of her birth. In 1832, she was married to William W. Whitney of New York. Davis later forwarded to them a letter he had received from a person named Bellechasse, then a resident of Matanzas, Cuba. The latter had been an intimate friend of Clark's, and told in this letter of a will made by Clark just before his death, which had been fraudulently suppressed. By this will, Myra was said to have inherited Clark's entire estate, except a small bequest to his mother. Myra at once determined to sift the story to the bottom, and if convinced of its truth, to take the necessary legal steps to recover the property rightfully hers. How persistently she followed this fixed determination, the story of the balance of her life will disclose. With her husband, she gathered together her belongings, and set out for Cuba. She learned from Bellechasse, who had been with Clark in his last illness, that he had read the last will made a few days before Clark's death; that Chevalier de la Croix, Judge Pitot, and himself were named executors; that De la Croix was named tutor for Myra, and that the will made Myra the testator's sole devisee. They proceeded thence to New Orleans in 1833. Whit-

ney at once publicly charged Relf and others with having fraudulently suppressed the last will of Daniel Clark. For this he was imprisoned, and released on giving \$10,000 bail. He afterwards was convicted and fined for criminal defamation of character. They then proceeded to collect the proofs, which consisted chiefly of the testimony of Bellechasse, Boisfontaine, De la Croix, and Mrs. Harper. When it is considered that Relf, who was charged with having suppressed the last will, was a prominent and respected citizen, and that Clark's property had all been disposed of by the executors ten to twenty years before, and now, much increased in value, was owned by many wealthy and socially and politically powerful citizens, we can but admire the pluck and nerve of this woman and her husband in undertaking the seemingly impossible task of vindicating her rights and recovering her property. Not only was Whitney cast into jail, but both Myra and her husband were treated with the utmost bitterness and antagonism. This led to attempts upon the life of Myra. At one time she was shot at, the bullet going through her bonnet.

On June 18, 1834, twenty-one years after her father's death, Myra filed an intervening petition in Clark's estate, praying that the will of 1811 be annulled and set aside; that she be declared to be the heir of Clark, and that Relf and Chew be ordered to deliver over the estate to her. Relf and Chew filed an answer, denying that Myra had any claim, that Clark was ever legally married, and that he had ever had any legitimate offspring. It will be noted that Myra's claim was based on her being the heir of Clark, no effort being made at this time to probate the will of 1813. In the course of this controversy, many depositions were taken. Finally, on June 8, 1836, the court pronounced judgment, non-suiting Myra.

On July 28, 1836, Myra and her husband filed a bill in equity, in the Circuit Court of the United States for the Eastern District of Louisiana, against Relf and Chew, and about fifty owners of property purchased from them, as executors of Clark's will. The object sought was to recover the Clark property. Upon the application of some of the defendants, an order was entered requiring complainants to provide defendants with copies of the bill in the French language, and to produce twenty-five original documents referred to in the bill, but not made exhibits and that the future proceedings in the case should be conformable to the provisions of the code of practice of Louisiana. Complainant did not comply with this order but petitioned for a writ of attachment against Relf for having failed to answer the bill. This motion, Judge Lawrence not only refused

to grant, but he resisted repeated applications to have the motion and its refusal recorded among the proceedings of the court. Thus the suit was at a stand-still, for complainants could not proceed under the order of the court, for it in effect deprived her of her equity rights, for the Louisiana code did not recognize such a thing as equity practice. Finally, her counsel petitioned the federal Supreme Court for a writ of *mandamus* to be directed to the circuit judge, setting up in the petition that such

"burdensome and oppressive exactions could have had no other design or tendency but to evade the suit and its legitimate consequences; and to wear out and weigh down the complainants by mere vexation and chicanery, too thinly veiled behind frivolous pretexts."

This was an *ex parte* petition, decided at the January term, 1839, Justice Story delivering the opinion of the court said,<sup>3</sup>

"That it is the duty of the Circuit Court to proceed in this suit according to the rules prescribed by the Supreme Court for proceedings in equity causes, can admit of no doubt. That the proceedings of the district judge and the orders made by him in the cause, which are complained of, are not in conformity with those rules, and with chancery practice, can admit of little doubt."

But the court held that the appropriate redress was by appeal from a final decree and denied the writ.

Complainant's counsel then made a motion in the Circuit Court to set aside the aforesaid obnoxious order. This motion was argued before Judges Lawrence and McKinley, who, unable to agree, certified the question to the federal Supreme Court. This case came on for decision at the January term, 1841.<sup>4</sup> Myra, after the death of her husband, of yellow fever in 1837, had married General Edmund P. Gaines, a hero of the War of 1812, and of the Seminole and Creek wars. He died in 1847, and his widow was never again married. The opinion of the Supreme Court was by Justice Thompson. He held that the order should be set aside, incidentally rebuking Judge Lawrence as follows:

"It is a matter of extreme regret, that it appears to be the settled determination of the District Judge not to suffer chancery practice to prevail in the Circuit Court in Louisiana, in equity cases; in total disregard of the repeated decisions of this court and the rules of practice established by the Supreme Court to be observed in chancery cases."

The circuit court having complied with the mandate from Washington and the defendants having filed demurrers, the two circuit judges again locked horns on the questions involved, and certified the same to the Supreme Court. The questions involved before the Supreme Court were the following:

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3. *Ex parte Myra Clark Whitney*, 13 Peters 404.

4. *Gaines v. Relf*, 15 Peters 9.

1. Is the bill multifarious? And have the complainants a right to join the defendants in this suit?
2. Can the court entertain jurisdiction of this case without probate of the will set up by the complainants, and which they charge has been destroyed or suppressed?
3. Has the court jurisdiction of this case, or does it belong exclusively to a court of law?

The Supreme Court's opinion by Justice McLean was rendered at the January Term, 1844.<sup>5</sup> It was held that the bill was multifarious in but two respects—in making Caroline Barnes a party, she being alleged to have rights as legatee under the 1813 will; (Caroline, it will be recalled, was the illegitimate child of Clark and Zulime, born in 1801), and in the prayer for an accounting from the executors Relf and Chew; but the court held that the bill could be amended in these respects. It was held that while the other defendants held different properties, the one from the others, nevertheless their source of title was common, and all alike depended on the validity of the will of 1811, and that the bill avoided multiplicity of suits without subjecting defendants to inconvenience or unnecessary expense, and therefore was not obnoxious as being multifarious.

On the second point, the court held that both under the general and the local law, the will of 1813 must be proved before any title could be set up under it, and that it could be probated only in the probate court, but nevertheless that complainant was entitled to answers from the defendants, which answers might be used as evidence before the probate court to establish the will of 1813 and revoke that of 1811. While the demurrer on the second point was decided in favor of Myra, it took from her the right to rely upon the will of 1813 and forced her in this suit to depend solely upon her rights as an heir.

On the third point, the court held that equity alone could give adequate relief, and that the court therefore had jurisdiction.

Patterson, one of the fifty odd defendants in this suit, instead of demurring, as the other defendants did, filed an answer and consented that the case might be tried. He owned a plot of ground in New Orleans which was bought in 1820 by one Correjolas from Relf and Chew, the executors, and which by mesne conveyances, had come into the possession of Patterson. The case was tried upon the records of the original hearing in the probate court, and the depositions of Mds. Despau and Caillavet, sisters of Zulime, De la Croix, Bellechasse, and Judge Pitot—intimate friends of

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5. *Gaines v. Chew*, 2 Howard 619.

Clark—Boisfontaine, the manager of his plantations, Mr. and Mrs. Davis, the foster parents of Myra, Mrs. Harper, who suckled the infant Myra, and others.

Decree was entered April 25, 1840, in favor of the complainant, requiring the defendant to convey the whole of the property to Myra. Patterson appealed to the federal Supreme Court, which handed down an opinion at the January Term, 1848, by Justice Wayne.<sup>6</sup> The court reviewed the facts at some length. Great stress was laid on the testimony of Mme. Despau, who was present in Philadelphia at the marriage of Zulime and Clark, and the court refused to be impressed by attempts to discredit her evidence. Boisfontaine said Clark frequently spoke to him in confidential terms of Myra, whom he always referred to as his legitimate daughter. He was with him about fifteen days before his death. On this occasion, he said, Clark took a sealed packet from a case, handed it to De la Croix, and said that his last will was finished, that he had appointed De la Croix, tutor for his daughter Myra, to whom he had given his estate, subject to an annuity to his mother, and that he had appointed De la Croix, Pitot, and Bellechasse, his executors. Previously he had told the witness he was making his last will, and that in it he should acknowledge Myra as his legitimate daughter. The day before his death, Clark told the witness his last will was in the little black case in his office room below. About two hours before his death, Clark instructed Lubin, his slave servant, in the presence of this witness, to be sure, as soon as he died, to carry this little black case to Chevalier de la Croix. A short time before Clark died, witness says Relf took a bunch of keys from Clark's armoire, one of which he thought fitted the little black case. Relf then left the room. Lubin told the witness that he saw Relf go into the office room below and lock the door. This little black case was never discovered, nor was the alleged will of 1813 ever brought to light, either in this case or any of the succeeding cases. Lubin was not a witness, being disqualified as a slave.

Both Mrs. Harper and Bellechasse testified to Clark's having confided to them that Myra was his legitimate child, that he should acknowledge her as such in his will, and Mrs. Harper testified to having read the will and that it left his estate to Myra, as his legitimate child. The court discussed the testimony deemed strongest against the marriage of Clark and Zulime—that they did not promulgate the marriage or live together, that neither De la Croix nor Mr. and Mrs. Davis knew anything of the marriage of Clark

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6. *Patterson v. Gaines*, 6 Howard 550.

and Zulime, that Coxe, the Philadelphia partner, swore Clark had never married, and the strange marriage of Zulime with Gardette without any dissolution of her marriage with Clark, and concluded that this testimony, most of it negative in character did not overcome the positive testimony of Madame Despau, corroborated as it was by the testimony of other witnesses.

On the other branch of the case—as to Zulime being a single woman at the time of her marriage to Clark—the court held that the burden of proof was not on the complainant to show that Zulime's marriage to Des Granges was void, but that the burden was on the defendants to show that the marriage of Clark and Zulime was invalid, by reason of Zulime's prior valid marriage. Madame Benguerel testified that when she reproached Des Granges for his baseness in imposing upon Zulime, he excused himself by saying that at the time he married her, he had abandoned his lawful wife and never intended to see her again.

The record in the bigamy case was not produced at this hearing.

The court found that the sale of Clark's property by the executors in 1820 was made without a judicial order of court, and in violation of law, and was made when the time within which the executors could act as such had expired, and consequently that Patterson was chargeable with notice.

The civil code of Louisiana in force at the time of Clark's death, provided

"That donations either *inter vivos* or *mortis causa* cannot exceed the fifth part of the property of the disposer, if he leaves at his death one or more legitimate children or descendants, born or to be born."

Under this statute, Myra, being found to be legitimate, was entitled to take four-fifths of her father's estate, as forced heir (the rights of the widow Zulime were not considered in this case) and the decree below, which gave her the whole of Patterson's property, was reversed, for this error only.

In February, 1850, fourteen years after the suit was instituted, there came on for trial the main suit against Relf and Chew and fifty other defendants. In 1844, Zulime, describing herself as the widow of the late Daniel Clark, had conveyed to Myra her moiety of one-half of Clark's estate. Myra thereupon had amended her bill in this respect, and she thereafter sued for one-half of the estate, as grantee of her mother, and four-fifths of the remainder, as a "forced heir." After a long trial, at which much new evidence was introduced, the circuit court dismissed complainant's bill for want

of equity, from which decree she appealed to the federal Supreme Court.

There was introduced at the trial a certificate in Latin, signed by a Catholic priest, setting forth that he had married Des Granges and Barbara Orci in New York in 1790, the certificate bearing date September 11, 1806. This was produced by James Gardette, the son of Zulime by her last husband, who stated that he and his mother had found it among some old papers belonging to his father. There was also introduced the record of the divorce of Zulime and Des Granges entered in 1806, minus the petition which was lost. The defendants introduced the record of the suit brought in 1805 by Zulime against Des Granges for alimony, the petitioner charging her husband therein with cruelty and desertion. Defendants also introduced the ecclesiastical record of the bigamy proceedings, heretofore referred to.

The opinion of the court was delivered by Justice Catron at the December Term, 1851.<sup>7</sup> The decree of the lower court was affirmed. The court in this case practically reversed the opinion in the Patterson case on the question as to where lay the burden of proof on the question as to Des Granges' prior marriage. Justice Catron says,

"The marriage of Zulime and Des Granges being conceded, it was established as *prima facie* true that Zulime was not the lawful wife of Clark and the onus of proving that Des Granges had a former wife living when he married Zulime was imposed on the complainant."

The court held that the evidence was insufficient upon which to base any finding of the prior marriage of Des Granges—that the statement of Zulime herself in the bigamy case was sufficient refutation; that the evidence of the sisters Despau and Caillavet was unreliable and untrustworthy, the court saying:

"It is palpable that the witnesses Despau and Caillavet swear to a plausible tale of fiction, leaving out the circumstances of gross reality."

The court also held that Zulime's marrying Gardette was the strongest kind of disavowal of any marriage between herself and Clark. Then there was the suit for alimony brought by Zulime against Des Granges, after her alleged marriage to Clark, which the court held was an admission that the defendant Des Granges was at that time her husband. The court rejected as of no importance the priest's certificate of the marriage of Des Granges and Barbara Orci in 1790, because the true name of the contracting groom did not exactly correspond with that of Des Granges, and

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7. *Gaines v. Relf*, 12 Howard 472.



more especially because the certificate was dated sixteen years after the alleged marriage.

The complainant in this case introduced the record in the Patterson case, and relied upon it as *res judicata*, but the court held that it was not binding on these defendants, because they were not parties to that suit, and because that controversy was not carried on in earnest. Patterson had been put on the stand by defendants, and admitted that General Gaines and his wife had in writing agreed that they would not take his property from him, and that they would make his title good; that all the costs of suit and his attorneys' fees had been paid by the complainants; that he had never been disturbed in his possession of his property and never expected to be. Because of this testimony, the court held that the Patterson case was in the nature of a consent suit, and not binding as a precedent.

Now, while it may be that Patterson, having nothing to lose by his suit, made a poor record below, it is certain that his counsel, retained to try the case on appeal, were ignorant of any such understanding or agreement between the parties, for they fought the case with great skill and earnestness. As proof of this, I revert to the Patterson case to quote the final paragraphs in the brief of Patterson's counsel:

"For Mrs. Gaines personally we feel every sympathy; but how often is it that the innocent offspring is made to suffer for the acts of the parent? And if ever parents deserved condemnation here or elsewhere, these parents have deserved it. A mother who, for the world's false esteem, would discard from her maternal breast two helpless infants, and never again look upon her own offspring—a mother who upon the case made by her own daughter, stands convicted of adultery before her pretended marriage with Clark, and with bigamy afterwards—such a mother is above the judgment of human tribunals. And what shall we say of the conduct of Daniel Clark, if Myra be his lawful child, and Madame Des Granges was his lawful wife? Courting another woman while his wife was living and at his death forgetting that she had been his wife, although he had, as pretended, pronounced her blameless; participating in the crime of separating two infants from their mother, to save the paltry pride of that mother. Such a man, if the claims of this lady be just, should be consigned to infamy in all human estimation. Even now, the web of destiny hangs around this unfortunate but innocent offspring, and the dreadful past cannot be recalled. After the lapse of forty years, the sun of truth shines upon this dark and adulterous intrigue, revealing all its deformity on the highest judicial records, and showing the vanity of Clark's latter attempts to efface the stain, if it could be called a stain, which his own wild passions had placed upon his child at her birth."

Reverting again to *Gaines v. Relf*, Justices Wayne and Daniel dissented from the majority opinion, the former writing a most

vigorous dissent. In the majority opinion of the court, the record of the divorce of Zulime from Des Granges was considered as proving nothing, because the petition being absent, it could not be determined upon what ground the decree was based. Justice Wayne showed quite conclusively that under the Spanish law—and the Spanish laws were still in effect in 1806, as no new laws had been passed after the acquisition of the territory by this country in 1803—that divorce *a vinculo matrimonii* could not be granted for anything occurring after the marriage. This, with other clear inferences from the record itself, as for instance that complainant sued in her maiden name, was sufficient to show that this suit was for an annulment of the marriage because of Des Granges' prior marriage.

The record of the bigamy case, tried before an ecclesiastical court, Justice Wayne says, was clearly incompetent, because it was authenticated by an official having no authority in the premises whatever. Moreover, he says the evidence of Zulime in said record is clearly incompetent, because a wife is not permitted to testify for or against her husband in a criminal action. This alleged admission of Zulime's, he says, was especially incompetent, because she was present in New Orleans when the case was tried and within the jurisdiction of the court and could have been called to testify in person. It may be said in passing that Zulime, though she was present in New Orleans from 1831 to 1853, the year of her death, was never called as a witness in any of these cases. The record of the alimony suit, he also urges, was incompetent.

Justice Wayne's dissenting opinion in this case is strong and persuasive, showing a thorough study of Spanish and ecclesiastical law. He displayed deep feeling, and became in this case as in subsequent cases as much a champion of Mrs. Gaines' rights as Justice Catron is shown to have been her opponent. The opinions of these two justices read more like the argument of advocates than the opinions of a court. Justice Wayne ends his fifty pages of dissent as follows:

"I do not know from my own reasoning that the sins of parents are visited upon children, but my reason does not tell me that it may not be so. But I do know, from one of those rays shot from Sinai, that it is said for the offense of idolatry, 'I, the Lord God, am a jealous God, and visit the sins of the fathers upon the children unto the third and fourth generation of them that hate me, and show mercy unto thousands of those who love me and keep my commandments.' It may be so for other offenses. If it be, let the victim submissively recognize him who inflicts the chastisement,

and it may be the beginning of a communion with our Maker, to raise the hope of a richer inheritance than this world can give or take away."

But did Myra submit? Was she content to give up her earthly inheritance, to wait patiently for that richer inheritance in the hereafter? After seventeen years of fruitless litigation, her two husbands lost by death during the arduous struggle, and doubtless the poorer by thousands of dollars in the way of court costs and expenses of suit, was she downhearted? No. She pulled up the buckle of her belt another hole, rolled up her sleeves and returned to the fray.

Let us turn aside, for a moment, from this history of her lawsuits, and briefly sketch the lady herself. During the administrations of Presidents Johnson and Grant, she was prominent in the social life of Washington, and at this time was described as follows:

"Mrs. Gaines is of medium height, slender but well rounded and symmetrical in form. Her brown hair is thick and clusters in short curls. Her eyes are dark and brilliant, her complexion is fair and clear, her features are regular, and she is beautiful beyond criticism. Full of life and animation, fresh in feeling and impulsive, with a store of information and a mind well cultivated, possessing rich humor and spirit, with manners cordial, piquant, and winning, she was a universal favorite in society, and had a court of gentlemen about her wherever she moved."

On one occasion Mrs. Gaines was being sued in a New Orleans court, presided over by Judge Buchanan. During the progress of the trial, her counsel fell into a wrangle with the judge, and withdrew from the courtroom. Whereupon General Gaines arose, dressed in his military uniform and wearing his sword, saying that although he was admitted to the bar, he was unfamiliar with the practice under the civil code, and therefore requested that his wife might be permitted to argue her own case. This request granted, Mrs. Gaines proceeded to address the jury at length, reading documents bearing on her case. The judge interfered, saying the documents were not in evidence. Mrs. Gaines still persisting, the court again interfered, whereupon Mrs. Gaines charged the judge with having an interest against her. The judge retorted with temper, and notified General Gaines that he was expected to control his wife in court, whereupon the stately old general arose to his full altitude of six feet, three inches, and assuming the position of a commander of grenadiers, and gracefully touching the hilt of his sword, responded: "May it please your honor, for everything that lady shall say or do, I hold myself personally responsible in every manner and form known to the laws of my country, or the laws of honor." This reply and the accompanying

action, and the appearance of the general in his military attire, aroused to a still higher pitch the Irish fire of the judge, who quickly answered, "General Gaines, this court will not be overawed by the military authorities," to which the general applied, "Rest assured, your honor, that when an attempt of that sort is made, the sword which I wear, in conformity to the regulations of the service and out of respect to this honorable court, will be quickly unsheathed to defend the rights and dignity of your honor and of all the civil tribunals of my country." This closed the incident. The writer of the above incident gives the following word picture of Mrs. Gaines as a litigant:

"This was the first appearance of Mrs. Gaines as her own advocate in court. Afterwards she advocated her case in and out of court, to the judges, in public and in private, in every place and under all circumstances, and in every form, and with every agency and appliance, maintaining all the while her confidence, her equanimity, her earnest zeal and unflagging energies, and exhibiting to the world the most remarkable example of courageous devotion and resolute persistency."<sup>8</sup>

After the sweeping decision against her by the United States Supreme Court in 1851, Mrs. Gaines shifted her position. Up to this time she had relief upon her rights as the legitimate daughter of Daniel Clark and as his forced heir. As we have seen, she was defeated in this claim, for the court held not only that she had failed to prove any marriage between Des Granges and Barbara Orci, but that she had also failed to prove the marriage between Daniel Clark and her mother Zulime. Thenceforward she relied upon the will of 1813. She proceeded to New Orleans, and filed a petition in the Probate Court to prove the will of 1813. Judge Lea held that the testimony of Boisfontaine, De la Croix, Bellechasse, and Mrs. Harper was sufficient to establish the legal presumption of the existence of such a will, and that its having been destroyed or revoked by the testator was satisfactorily rebutted. He held, however, that the will had not been proved in conformity to the code of Louisiana, which required the testimony of two witnesses, when the will should be presented for probate, who should declare their recognition of it as having been written by the testator—that it had been signed and sealed by him, and that they had often seen him write and sign in his lifetime. He therefore denied the petition for the probate of said will.

Myra thereupon appealed to the Supreme Court of Louisiana, which rendered an opinion in 1856.<sup>9</sup> This court held that the re-

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8. *E. F. Ellet*, "Court Orders of the Republic."

9. *Succession of Daniel Clark*, 11 La. An. 124.

quirements of the code of Louisiana for proving wills applied only where the will itself was presented, but that if it was lost or destroyed by other than the testator, secondary proof of its contents was admissible, saying:

"Otherwise, a reward would be offered for villainy, and it would always be in the power of an unscrupulous heir to prevent the execution of the will."

The court reversed the lower court, and ordered the 1813 will to be admitted to probate. It is important to note, however, that the court said:

"The decision which we make does not conclude anyone who may desire to contest the will with her in a direct action, and to show that no such will was executed."

The personnel of the Louisiana Supreme Court at this time is interesting. The opinion was by Chief Justice E. T. Merrick, the father of Edwin T. Merrick, an eminent member of the New Orleans Bar and an uncle of George P. Merrick, a member of the Chicago Bar. Justice Buchanan who had the wrangle with General Gaines was a member of the Court but did not sit in the case. Justice Lea who had decided the case below was a member of the Court and rendered a dissenting opinion. It is unusual for a judge to sit as a member of a court reviewing his own decision.

Myra then filed her bill in the federal Circuit Court against Hennen and other purchaser of the Clark properties. The case was in the first instance tried against Hennen alone. The court dismissed the bill for want of equity. An appeal was taken to the federal Supreme Court, which reversed the lower court in 1860; opinion by Justice Wayne.<sup>10</sup>

Among the defenses was the ten-year statute of limitations. This, the court disposed of by showing that Myra became of legal age in 1826. She instituted her first suit in 1834, and had been continuously at it ever since. The court took back in part what was said in the preceding case about the Patterson case being a collusive case, saying that while the

"Arrangement made between General Gaines and Patterson was indiscreet and such as would not be tolerated in a court of justice, yet it was not an intentional deception in contemplation of any undue advantage."

The court held the record in the bigamy suit absolutely incompetent, in that it was the record of an ecclesiastical court, the presiding priest of which had no authority whatever under the Spanish or ecclesiastical law to try the charge of bigamy.

We can perhaps illustrate the keenness and thoroughness of the argument, by paraphrasing the contentions of the two parties

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10. *Gaines v. Hennon*, 24 Howard 553.

on the question of Myra's rights under the will of 1813, as follows:

Say her opponents:

"Even if this will of 1813 be established, still she cannot take, as the Spanish law did not permit illegitimates to take under a will."

"Yes," says Myra's counsel, "so it does, but where the illegitimate child is acknowledged by its parents it may take if there be no legitimate child, and Clark acknowledged Myra in his will."

"Yes," say her opponents, "the acknowledgment makes the child competent to take, except where in addition to being illegitimate, one of the parents has committed adultery; that is to say, where one or both of the parents, at the time of the child's conception, was connected by marriage with some other person."

"Yes," says Myra's counsel, "that is true, but even in such case the child may take, if either of its parents had entered upon marriage with the other in good faith, believing the other competent to marry, as was the case here on the part of both parents, or at least on Clark's part."

And so the court held that even if Myra were illegitimate, which they held she was not, she could take under the olographic will of 1813. The opinion ends as follows:

"When hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its courts."

Justices Taney, Catron, and Grier dissented; Catron and Grier writing opinions. Justice Catron made the point that, conceding the marriage of Zulime and Clark, then that marriage made Caroline a legitimate child of the marriage and an equal heir with Myra, and one whom under the law he could not disinherit. Justice Wayne had avoided this dilemma, by declaring that Caroline was the daughter of Des Granges and not of Clark, although it will be remembered Clark, when he sent Zulime to Philadelphia, wrote to Coxe, his partner, that she was pregnant, and acknowledged himself to be the father. Justice Wayne's argument is that Des Granges left New Orleans less than nine months before Caroline was born, and as access between man and wife is always presumed unless otherwise plainly proved, Caroline should be presumed to be the offspring of Des Granges.

Justice Catron also urged that Mrs. Gaines was estopped from relying on the will, because by an amended bill filed in a suit in 1848 she renounced all her rights as devisee under the will of 1813, and relied upon her rights as Clark's "forced heir." He also strongly insinuated the belief that this case, as well as the Patterson case, was collusive.

Justice Grier dissented in a single paragraph, which is quite as caustic as it is brief. He says:

"I would dissent from the opinion of the majority of the court in this case, both as to the law and the facts. But I do not think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so. I therefore dismiss the case, as I hope, for the last time, with the single remark, that if it be the law of Louisiana that a will can be established by the dim recollections, imaginations, or inventions of anile gossips, after forty-five years, to disturb the titles and possessions of bona fide purchasers, without notice, of an apparently indefeasible legal title, *'Haud equidem in video, miror magis.'*"<sup>11</sup>

It is interesting to note how the decision of the court, which was against Mr. Gaines, five to two in the case of *Gaines v. Relf*, now, nine years later, changed to her favor, five to three. Unquestionably, the fact that the will of 1813 had been established by the decree of the Louisiana Supreme Court had great weight. And yet but one justice changed front. Justice Nelson was against Mrs. Gaines in 1851 and for her in 1860. Justices McLean and Taney, who did not sit in the case in 1851, now took part in the decision, the former being for complainant and the latter against her. The most important fact in the situation, however, was that Justices Curtis and McKinley, who were against complainant in 1851, were no longer on the bench, their successors, Clifford and Campbell, being for complainant. From this, we may venture the opinion that had the court been constituted in 1860 as it was in 1851, Mrs. Gaines would have lost the Hennen case.

It was thought by the court that the decision in the Hennen case in 1860 would bring an end to the litigation. But such was not to be. The case had not been tried below as to the other defendants, including the City of New Orleans. As to them, it was finally decided against Mrs. Gaines, and she appealed again to the federal Supreme Court. The record contained eight thousand printed pages. In December, 1867, the Supreme Court reversed the lower court, sustaining each of complainant's contentions.<sup>12</sup> In the opinion by Justice Davis, to which Justices Grier, Swayne, and Miller dissented, the history of the case is reviewed, and the evidence analyzed in a masterly way. Justice Davis' opinion is terse, scholarly, and convincing. He says,

"The influence of the probate of the will of 1813, in deciding the civil status of Mrs. Gaines, cannot be overestimated \* \* \*. The circumstances under which this will was recognized are peculiar, and entitle the court which pronounced it valid, to the tribute of our admiration. It was proved

11. Dr. Samuel Johnson when first viewing Edmund Burke's handsome residence at Beaconsfield, exclaimed "*haud equidem in video miror magis:*" *Prior's "Life of Goldsmith,"* Vol. II, p. 134.

12. *Gaines v. New Orleans*, 6 Wallace 642.

by the memory of witnesses forty-three years after it was made, in the height of the litigation instituted by Mrs. Gaines to obtain possession of her father's estate; but notwithstanding the effect of the probate of it was to recall the will of 1811 and endanger titles acquired under it, so strong was the proof of its authenticity, and so complete the evidence of its contents, that a court, administering justice in the midst of a people claiming rights hostile to it, did not hesitate to order it to be recorded and executed as the last will and testament of Daniel Clark."

He characterizes Clark's acts and motives in a way showing a deep insight into human character. He says:

"The difficulty of acknowledging the marriage to Zulime was greatly increased by her subsequent marriage to Gardette. Clark could not acknowledge it to the world without injuring her, which no right-minded man under the circumstances would wish to do. According to the testimony of Baron Boisfontaine, Clark considered her blameless, and would have made his marriage with her public if it had not been for the obstacle interposed by the Gardette marriage. It is easy to see the struggle in the mind of Clark on this subject. He had sustained improper relations with a woman of uncommon personal attractions, to whom he was passionately attached. This woman he afterwards married, and lived with in secret for several years. Estrangement took place, and he separated from her. She had repaired to Philadelphia to procure evidence of her marriage; but being unable to get it, and advised of its invalidity, had married another man with whom she was quietly living. Two children were the result of the intercourse between them—one born before and the other after marriage—the latter the legitimate heir of the father, if he married the mother, believing in good faith she was capable of contracting marriage. To acknowledge a marriage with such surroundings was to lose social caste, and put in peril a woman whom he once loved and still professed to respect. Not to acknowledge it was to bastardize a child for whom he had great affection, and to see a large part of his estate go to others, who had no claims on his bounty. There were thus presented to his mind conflicting motives. Duty to himself and society, and affection for his child, prompted him to proclaim his marriage, while pride, the fear of social degradation, and the natural desire not to inflict additional injury upon Zulime impelled him to a contrary course. That he yielded to the influence of unworthy motives, and lived for years a life of deception, only proves that his baser nature during that time got the control, and that he acted as other men in similar circumstances have acted before him. But, before he died, the better nature of this man of lofty pride and sensitive honor was aroused and gained the ascendancy. He atoned in some measure for the errors of his past life; for he not only made a public acknowledgment, in the last solemn act of his life, that his child was legitimate, but a short time previous to his death frequently repeated the declaration to Mrs. Harper, who had nursed the child in infancy, and to Boisfontaine, who managed his plantations, and was with him when he died."

He refers to Clark's love affair with Miss Caton of Baltimore, while he was still the husband of Zulime, and of his writing a letter in which he said that if he could gain her affections, he should offer himself to her. He says:



"This letter was written after his estrangement from Zulime and separation from her, but before her intermarriage with Gardette. It cannot be denied the writing of it was a base and inexcusable act, and in itself affords an additional proof, if any were necessary, how easy the descent, when a man, with a fixed purpose, is leading a life of deceit. Clark, for years, had been imposing himself on the world in a character different from his real one, and when his affections were weaned from Zulime he attempted to do what, if he had succeeded in doing, would have blackened his memory forever. But fortunately, before he died, his line of conduct was changed. Affection for his child and uncertain health, doubtless subdued him, and induced him to disclose what, as an honorable and honest man, he should never have wished to conceal. In resolving the issue of marriage or no marriage, the effect of this letter is unimportant when opposed to the direct testimony that there was a marriage, on which we have offered sufficient comments. Without pursuing the subject further, it is our conclusion from the whole record, as a matter of fact, that the father and mother of complainant were married."

Justice Davis closes his opinion as follows:

"Courts in the administration of justice, have rarely had to deal with a case of greater hardship or more interesting character and history than the one we are now considering. \* \* \* To the discredit of the friends of Daniel Clark, this child grew to womanhood in utter ignorance of her rights and parentage, and did not ascertain them until 1834 (then not fully); since which time she has been endeavoring to obtain her rightful inheritance. Owing to the lapse of time, it was difficult to reach the truth, and necessarily for many years, she groped her way in darkness; but finally she was able to show the great fraud perpetrated against her; for, in the judgment of the Supreme Court of Louisiana, she established the validity of that very will, which, forty-three years before, her father had executed in her favor. After argument by able counsel, and on mature consideration, we have reaffirmed that decision. Can we not indulge the hope that the rights of Myra Clark Gaines in the estate of her father, Daniel Clark, will now be recognized?"

There will also be found in 6 Wallace Reports the case of *Gaines v. De la Croix*. This was the ninth case to be decided by the United States Supreme Court. De la Croix, who was the same person as was named by Clark as one of the executors in the 1813 will, made two purchases of slaves from Relf, the executor, in the year 1813. Suit against him in the court below had failed, and Mrs. Gaines appealed. While the sales were not subject to the irregularities that attached to many of the sales of real estate, the court held that he had full knowledge of the execution of a later will by Clark, and that he therefore could not pose as an innocent purchaser, and reversed the case.

The hope indulged in by Justice Davis, that after 33 years of litigation and fifty-four years after Clark's death, the rights of Myra in the estate of her father would be recognized was not to be realized. After this decision was rendered, one Fuentes and seventy-

five others presented their petition to the Probate Court at New Orleans, in 1869, to revoke the Clark will of 1813, and to annul its probate. Mrs. Gaines moved for the removal of the case to the federal court, which motion was overruled. In this case was introduced for the first time what was called a "proces verbal," being a certificate by Gallien Preval, a justice of the peace, dated August 16, 1813, reciting that he, James Pitot, De la Croix, and Richard Relf were present at the death of Daniel Clark, at six o'clock P. M., on August 16, 1813; that Relf requested the justice to seal all estate papers, which was done, and that the doors of the room containing same were then closed and sealed, and a guardian set to guard the room; that then Relf "at the moment of closing the 'proces verbal' ", took from a trunk of decedent, an olographic will, which was removed for the purpose of presenting it to the Probate Court. This was the 1811 will. This "proces verbal" was signed by the justice and witnessed by Pitot, De la Croix, and Relf. This was obviously presented for the purpose of laying the foundation of a claim that Clark had himself destroyed the will of 1813. It seems to me that this important document, now brought forward for the first time, about sixty years after Clark's death, is, to say the least, strongly suggestive of forgery. The court found with the petitioners, and an order was entered, setting aside the probate of the 1813 will.

Mrs. Gaines appealed to the Supreme Court of Louisiana, which court in February, 1873, affirmed the judgment of the Probate Court.<sup>13</sup> The court held that, as the will of 1813 was last seen in the possession of Clark, the presumption was that he had destroyed it. The court reviewed the testimony of De la Croix, Boisfontaine, Bellechasse, and Mrs. Harper, and held it insufficient. De la Croix said he called on Clark shortly before his death. Clark showed him a packet freshly sealed, which he said contained his will. Boisfontaine never saw the will. Bellechasse saw the will, but did not read it, as he said he could not read English well. Mrs. Harper alone had read the entire will. Bellechasse said the will was dated in 1813, Mrs. Harper said it was dated in July, 1813, but neither testified to the exact date, which the Supreme Court deemed necessary, saying:

"There is not a jot or tittle of evidence to prove the will was dated July, 1813, and we are at a loss to imagine how that date happened to be given to the will, when it was probated in 1856."

From this decision, Mrs. Gaines again appealed to the federal Supreme Court. The case was decided at the October Term, 1875.<sup>14</sup>

13. *Fuentes v. Gaines*, 25 La. An. 85.

14. *Gaines v. Fuentes*, 92 U. S. 10.

Justice Field, delivering the opinion of the court, considered only the alleged error of the trial court, in denying the motion for the removal of the case to the federal court, saying that if this application should have been granted, the subsequent proceedings were without validity. The court held that since the suit was between residents of different states, and the necessary affidavit had been filed the case should have been removed. In 1867 a federal statute had been passed to relieve against the miscarriage of justice resulting from the bitter enmities arising from the war. This statute provided for the removal of a case upon affidavit being filed, setting up that justice could not be obtained by reason of local prejudice. The court held this statute applied, even though the suit involved purely matters of probate, as to which, ordinarily, federal courts have no jurisdiction. For this error, the judgment was reversed; Justices Bradley, Swayne, and Waite dissenting.

Upon the cause being remanded, it was removed to the federal Circuit Court, and tried before Judge Billings, at the April Term 1877. The argument occupied seventeen full days. He held<sup>15</sup> that so long as it was proved that the will was dated in July, and bore a date, that it was unnecessary that the exact day of the month be proved, that the fact of the execution of the will was satisfactorily established; and that the presumption of Clark's having destroyed the will, because last seen in his possession, should not prevail because such presumption was rebutted by the testimony of Boisfontaine, who said he was with Clark during the last two days of his life, and never left his bedside and that during his last hours Clark spoke of this will and of the gratification it gave him, that by means of it he had provided for his daughter. He entered a decree against the petitioners.

And now, after forty-three years of continuous litigation, Myra Clark Gaines had finally succeeded in established herself as the legitimate daughter of Daniel Clark, entitled as legatee and devisee to take his property under the will of July 13, 1813. But this decision of 1877 did not bring the litigation to a conclusion. For thirteen years thereafter, Mrs. Gaines and after her death, her personal representatives, struggled to recover lands, and the rents and profits thereof, from various parties. A brief reference to these suits will suffice.

One of these cases was against the City of New Orleans for rents and interest on property which was originally worth \$200.<sup>16</sup> The city had purchased it in 1834, and built a drainage building on

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15. *Fuentes v. Gaines*, 9 Fed. Cas. 1042.

16. *Gaines v. New Orleans*, 15 Wallace 624.

it. Mrs. Gaines recovered its rental value from 1834, amounting to \$84,800, plus interest of \$72,800, less certain amounts paid out for repairs, leaving her net recovery \$125,000.<sup>17</sup>

The case of *New Orleans v. Gaines, Admr.*<sup>18</sup> decided in 1888, was a suit brought against the city for the rents and profits of four square blocks of land. The decision of the lower court was in Mrs. Gaines' favor, and she recovered judgment for almost two million dollars. The suit was for the rents and profits, not only chargeable against New Orleans, but also those chargeable against its grantees. Two of these grantees were Agnelly and Monsseaux, against whom Mrs. Gaines had secured judgments amounting to \$576,707. She claimed the right to sue the City of New Orleans for this sum, upon the theory of subrogation, the City of New Orleans having warranted the title in its deeds to Monsseaux and Agnelly. The court upheld this contention. As to the balance of the decree, amounting to \$1,348,959, the court reversed the case. This amount had been arrived at by computing interest upon the value of vacant lands from which the city had actually received no rents or income. The lower court based this part of its decree on the principle that one buying property in bad faith must account not only for rents and income actually received, but also for what the property might have been made to produce. Justice Bradley, writing the opinion, says that this is not the true rule, as applied to this case. He said:

"There are degrees of bad faith. There are some possessors, who, without any title at all, pertinaciously keep the true and known owner out of possession. They may be called *knavish* possessors. There are others who take a conveyance and go into possession in entire ignorance of any defect in their title, though they are technically possessors in bad faith, because by proper inquiry they might have discovered the defect. Such possessors certainly cannot be placed on the same level with the knavish and fraudulent possessors, of whom we have just spoken."

Justice Bradley indicated that, had this case been before him in its entirety, he might have decided it against Mrs. Gaines. He said:

"Although bound by the decisions that have been made by the court in the matter, we cannot say, and no one can say, that there was not much evidence of a very strong character in favor of a contrary conclusion."

It appearing that Mrs. Gaines had received payment of a part of the judgments against Agnelly and Monsseaux, the court directed that upon remandment of the case, the amount so received be determined and the same credited on the amount due from the city.

17. For other cases not commented on herein see *Davis v. Gaines*, 104 U. S. 386, *Gaines v. Miller*, 111 U. S. 395.

18. 131 U. S. 191.

Upon remandment, it was found Mrs. Gaines had received \$15,000 on said judgments, and this reduced her judgment against the city to \$561,707. Both parties appealing from this judgment, the case was again brought to the Supreme Court, where in an opinion by Justice Bradley, rendered at the October Term, 1890, seventy-seven years after the death of Daniel Clark, the court upheld this reduction of \$15,000 in the judgment.<sup>19</sup> However, the Gaines estate got more than even, for the court directed that \$34,000, being the costs of the Agnelly and Monsseaux judgments, be added to the judgment against the city.

So far as I can learn, this decision ended the litigation. It is certain that it was the last case in the reports. Beginning in 1834, the case in one form or another was continuously in one court or another, and frequently in several courts simultaneously, until 1890, a period of fifty-six years.

This discussion is intended only to touch the high spots. There are many other cases in the Louisiana Annual, the Federal Reporter, and in the Federal Cases. If all the opinions in the cases to which Mrs. Gaines and her estate were parties, growing out of her efforts to secure her rights in the estate of her father, were printed together, they would fill several ordinary sized reports. But Mrs. Gaines did not live to see the finish, for she died at New Orleans, January 9, 1885, at the age of seventy-nine years.

One wonders how Mrs. Gaines was able to finance this enormous litigation. There is very little to be learned about the litigation or the interested parties outside the law reports. I am unable to say whether Whitney or General Gaines were men with fortunes. Certain it is that in 1841 General Gaines and his wife toured the country as lecturers, he addressing himself to the subject "A New Plan of National Defense," and she to the subject "The Horrors of War," the *pro* and *con* of "preparedness," as it were.

The case was in the United States Supreme Court sixteen times. Of the fifty-three justices who sat in that court from the organization of our government down to 1890, thirty-four or nearly two-thirds took part in one or more of the decisions of this case in that court. Many noted counsel took part in the case, among others Reverdy Johnson, Jeremiah S. Black, Thomas J. Semmes and Daniel Webster.

I have been unable to ascertain the total amount of property recovered as the result of this litigation. It is said that in 1874 Mrs. Gaines had recovered six million dollars in property and cash.

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19. *New Orleans v. Gaines Adm.*, 138 U. S. 595.

This ends the story of a litigation which stands out conspicuous because of the prominence of the central figures, and which, by reason of the romantic events involved, the amount and value of the property at stake, the great length of time it was in the courts, the complexity of the almost numberless points involved and the intensity with which it was contested on both sides, stands unparalleled in the annals of court trials in this country or elsewhere.

It is fitting that in conclusion, I should say just a word about the last will of Myra Clark Gaines. The trials, tribulation, and delay which characterized the probating of Daniel Clark's last will, were destined to accompany the probate of the will of his daughter.

She died January 9, 1885, leaving children and grandchildren by both Whitney and General Gaines. A few days after her death, two wills were presented for probate at New Orleans, an olographic will dated January 8, 1885, and one signed by a cross and witnessed, dated January 5, 1885. Both wills were contested. The Probate Court decided the olographic or Evans will, as it was called, was a forgery and denied probate to the other because not executed and witnessed in the manner required of non-resident testators.

The story told by Mrs. Evans was that the day before Mrs. Gaines' death, she went to call on her, but was denied admittance. She went to her lawyer's office and later determined to try again. She passed by the house three times, uncertain whether to ask admittance. Upon her final return, a woman shabbily dressed and heavily veiled, standing on the lowest of the front steps, handed her an envelope done up in a handkerchief, saying it was from Mrs. Gaines. She returned to her home, and, opening it, found it to be the will of Mrs. Gaines in her own handwriting, and dated January 8, 1885. By this will, Mrs. Gaines left some real estate to Julietta Perkins, the mother of Mrs. Evans. The residue of her estate she left one-third to Mrs. Evans, and two-thirds to her own grandchildren.

These two wills were also presented to the Surrogate Court in New York, which was Mrs. Gaines' domicile at the time of her death. Belva A. Lockwood, of blessed memory, was of counsel for Mrs. Evans. This court also decided the Evans will to be a forgery, but admitted the other will to probate. Of course, both the New Orleans and the New York decisions were appealed from. The case was in the Louisiana Supreme Court six times, and in the Supreme Court, Appellate Division of New York once, and was finally decided adversely to the Evans will, by the New York Court of Appeals in the year 1897.

# THE SCIENCE OF PRACTICE—THE YOUNG PRACTITIONER'S NEED

By EDWARD R. BRANSON<sup>1</sup>

When a man has been admitted to the bar, is he always equipped for his work? Does he understand practice, as well as theory? Is he prepared to undertake the duties of a practitioner, or is he merely a legally trained student who must go through still another novitiate? Admittedly, there has been a notable improvement in the methods and standards of legal instruction. Admittedly, the law schools of the better class throughout the country have made progress—substantial progress—in recent years, but may it not be said that there is still much to be desired?

If the young man, upon his admission, be illy equipped for his duties—if the student atmosphere still clings to him and he cannot become the *practical* man—it is not always the law school's fault. The fault may be within himself. Nor may it be said that any general rule is deducible from the mere fact that there are instances of this character. The only thing apparent is that, irrespective of where the fault lies, many such instances may be found.

The older practitioner presents a solution for you, if you are willing to accept it. He will tell you, for example, that skill in drawing forms, especially forms in pleading, will come with experience and only with experience. Does this mean, then, that the young lawyer must wait for the years to give him this experience, or does it mean that he must associate himself with an older man or depend on the older man for guidance and instruction before he can file an action at law or a suit in equity? The older lawyer will inform you that it does not do to depend on a form book. He himself, he tells you, depends on his head. He can prepare the necessary form without looking into a form book. Granted that this may be so. But can he prepare *any kind* of a form without consulting a form book? Could he prepare a form, "out of his own head," when he was starting to practice?

The conclusion one is forced to reach is this: The form book has its place—it is useful—but, whether the practitioner be the possessor of such a working-tool, or not, he must first understand the *science* of drawing a legal form. If he does have an intimate knowledge of the science of preparing a pleading, or a form in conveyancing or an instruction to the jury, he may be in a better

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position, on many occasions, to dispense with the use of a form book. If he has no acquaintance with the science, his form book will be meaningless, for he will be unable to construct and reconstruct, to modify and adapt, and his working-tool will become an object of suspicion and dread and a potent force in accomplishing his professional downfall.

If, then, there is such a thing as the science of drawing a legal form, when should this science be mastered? Should a knowledge of the science be acquired before or after admission? An answer to these questions will be found in your answer to a third: Would you, if you were a client, be willing to employ a lawyer who could not prepare an adequate pleading and accurately and technically set out your cause of action or your defense?

Manifestly, the time to study the science of drawing a declaration, or a bill in chancery, or any other pleading, is *prior* to admission. If the young man has not done so, he may be brought to a realization of his incompetency when his first client appears. He will be confronted with this unpleasant fact: He is *not* a practitioner. Much of the novitiate is still before him.

It may be argued that the best school is the school of experience—that a man must be jostled and buffeted by the world and by his competitors before he may hope to be a successful lawyer. In a measure, this is true, but does it excuse him for a lack of preparation along practical lines? Could he not have gained time and have acted to better advantage for himself and for his clients if his preparation had been made at the proper time? Would he not have hastened, rather than retarded, his recognition at the bar?

Forms in pleading have a definite origin and history. Much of the phraseology employed has been handed down for generations and even centuries and much of it has undergone change. In drawing a pleading, the student or the young practitioner may know that he should follow the ancient or the approved forms of expression, but he should be careful to remember that this is merely *formal* language, and the mere fact that he makes use of such phraseology does not mean, necessarily, that his pleading will be satisfactory.

Suppose he has occasion to file a suit against a railroad company for the loss of baggage entrusted to its care, and elects to bring his action in assumpsit. How should he prepare his declaration? What are the necessary averments? Will the common counts lie? These are some of the questions he must face and answer.



Suppose he is bringing an action of case—a suit, say, for slander. Does he know the office of an *innuendo*? Does he know there is such a thing as an *innuendo*?

Let us assume that he has filed an action of trespass *de bonis asportatis*. What are the necessary averments here? With what particularity must the property be described. Will it be sufficient to allege that the defendant took and carried away *four tables*, "the property, goods and chattels of the plaintiff, of the value of one hundred dollars," or should every table be specifically described?

Let it be assumed, on the other hand, that he is defending an action, in assumpsit, on a promissory note. He wishes to plead failure of consideration. How does he do so? Is he familiar with the fact that the common law rule is not the same as the rule in Illinois? Is he aware, if he be practicing in Illinois, that it will not do to file the general issue—that either total or partial failure of consideration must be specially pleaded?

When he was preparing for the bar, he became more or less familiar with the rules of common law pleading. He learned that there must be singleness of the issue. He learned the rules as to certainty and definiteness. If called upon to give them, upon an examination, he could do so glibly. But if he is engaged in the practice, can he *apply* these rules? Does he really understand them or is it all parrot-like memory work? Could he really answer practical questions in pleading—questions such as he would encounter in the practice? The following questions, based upon actual adjudicated cases, are submitted for his consideration:

A brings an action of assumpsit on the common counts against B, A's claim being based upon the warranty of a chattel. B's counsel contends that there can be no recovery under this form of action. What do you think? Give reasons for your answer.

A brings an action on the case against B. B interposes a plea of not guilty. Under this plea, B seeks to show, upon the trial, certain matters of justification. Is this allowable? Give the rule.

What is the operation and effect of a plea of not guilty to an action of trespass *de bonis asportatis*?

Where an action of replevin is brought, what is the effect (a) of a plea of *non cepit*; (b) of a plea of *non detinet*?

How many pleas may be filed by a party to a cause, in a common law action? How many replications may be filed?

May a plaintiff, in the same replication, traverse a plea and also confess and avoid?

A enters into a contract under seal, providing for the conveyance of a tract of land to B on or before a specified date. A fails to make the conveyance. What is the appropriate form of common law action in such a case?

If the young practitioner is engaging largely in a chancery practice, or is endeavoring to enter upon a chancery practice, will he be in a position to answer the following questions:

A exhibits his bill in equity against B. B files a plea, which purports to be a plea to the whole bill, but which, as a matter of fact, answers only part of the bill. Is the plea good or bad? Give reasons for your answer.

How is a bill in equity drawn, at the present time, under the Illinois practice?

In a bill for divorce is it necessary to waive answer under oath?

Let us imagine, now, that the youthful practitioner is devoting his attention to criminal jurisprudence. Then let us ask him these questions:

Do you know what is meant by an information and what is meant by an indictment?

Do you know what language *must be* employed.

If you are practicing in Illinois, do you know the source of the phrase, "The grand jurors, chosen, selected and sworn"?

Do you know how an indictment should commence and how it should conclude?

Are you aware of the purpose of the different counts in an indictment?

Do you understand the reason for technicalities prevailing in criminal procedure?

Do you know why it will not do to aver, in an indictment, that the defendant did make an assault, etc., with malice aforethought, etc., upon one John Doe, with a *hickory* club, and then and there kill and murder the said John Doe, when the proof shows that a *pine* club was employed by the defendant?

Let us take it for granted, however, that the young practitioner comprehends the art or the science of constructing forms in pleading—whether it be at common law or in chancery or whether it

pertain to criminal procedure. His pleadings are properly drawn and properly filed. Further, he is familiar with the rules of evidence and is prepared, at the right juncture, to interpose objections and to support them with a valid reason—in short, his position is tenable. The arguments have been concluded and the cause is ready to be given to the jury.

Now, what does he do?

Is he a trained man in the art of writing instructions? Will the instructions he has drawn be adequate and unobjectionable?

Is he aware that, if he merely consults a form book on instructions *without understanding the science of building an instruction*, he may be hopelessly lost? Does he know that, even though his client's cause be meritorious, defeat may be encountered in the higher courts because of faulty instructions?

He may understand that, in jurisdictions where written instructions are required, he should commence by saying, "The court instructs the jury," but is this all he is obliged to do?

Suppose, in his instructions, he should announce a correct principle of law, but should find, later on, that his instruction was not pertinent and relevant to the issues. Suppose in his instructions he causes the court to invade the province of the jury. Suppose his instructions are ambiguous, or equivocal, or misleading, or confusing.

Could anyone contend for a moment that the practitioner's instructions are correct simply because he has used an *approved* form or precedent? Approved forms of instructions are highly desirable, but *they must be correctly employed and must really be applicable to the issues at bar*. A principle of law, in the abstract, may be wholly sustainable, and it may have been laid down in identical language by a higher court, but it does not follow that this principle—as couched in an approved instruction—will be a safe guide. It certainly will not be if the principle cannot be applied to the case in hand.

Will the young man, then, have sufficient training to enable him to prepare instructions that correctly outline the issues and the law applicable thereto? Will his training so direct his course that he will avoid instructions based upon an *assumption of facts*? Will he escape the peril of an *argumentative instruction*? Will his instructions be free from the fault of *giving undue prominence to matters of evidence*?

In fine, is he actually equipped to prepare instructions that will stand the test of criticism and review? If not, is he ready for the practice of his profession?

Recapitulating, then after a survey of the situation as it confronts the member of the bar who has just received his license, it may be said that his greatest need is a training that will fit him at once for the *active* duties of his calling. Should it be necessary for him, after his admission, to learn details of practice—the science of the practice—a knowledge of which, beforehand, would have spared him misdirected energies and humiliating experiences?

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## COMMENT ON RECENT CASES

CONSTRUCTION—RULE AGAINST PERPETUITIES—FAILURE OF VALID LIMITATIONS ALONG WITH VOID LIMITATIONS.—Whenever some one or more of the limitations of a will are void for remoteness, the important practical question at once arises, how far will the valid limitations also fail? In the case of *Barrett v. Barrett*, 255 Ill. 332, at 338, the court laid down the general rules as follows: "where several trusts are created by will which are independent of each other and each is complete within itself, some of which are lawful and others are unlawful, and which may be separated from each other, the illegal trusts may be cut out of the will and the legal ones permitted to stand." On the other hand, "when some of the trusts

in the will are legal and some are illegal, if they are so connected together as to constitute an entire scheme for the disposition of the estate, so that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or to some of them, then all the trusts must be construed together and all must stand or all must fall." After these general statements have been made the practitioner is not much farther along than he was before. The question still remains, when are the gifts separable and when are they inseparable? When is it to be held that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected? When does manifest injustice result from a construction which sustains some portions of the will while others are eliminated? A classification of all the results reached will reveal more precisely some considerations which induce the court to answer these questions one way or the other.

Let us take first the cases where the court held that the valid limitations should be enforced and observe those characteristics which induce the conclusion reached.

In *Howe v. Hodge*, 152 Ill. 252, we have the devise of a residue to trustees to convert and divide the principal among all the testator's grandchildren, so as to vest an interest in them at birth, but subject to a postponement of payment of the principal until each arrived at thirty years of age. Then there was a gift over if any grandchild died before that age. The gift over was held void for remoteness, but the original gift to the grandchildren stood. This was in spite of the fact that there was a trusteeship and because the valid gift was the disposal of an absolute interest in the corpus of the estate direct to the grandchildren. This is the controlling feature noted in *Barrett v. Barrett*, 255 Ill. 332, 346.

In *Nevitt v. Woodburn*, 190 Ill. 283, a devise was made to the testator's son for life, with a remainder in fee to his children, with a gift over if he died childless to the families of the testator's brothers. The gift was void for remoteness. It was held, however, that this did not invalidate the gift to the grandchildren. The court said that there was no such connection between the limitations as required both to stand or fall together and that no injustice was done by permitting the valid part to stand. In *Barrett v. Barrett*, *supra*, the following characteristics are noted as controlling the decision: (1), that there was no trusteeship: the estates were legal; (2), the valid portion of the will included a life estate and a disposition of the fee directly and absolutely, the void part being a gift over after such disposition in fee. Hence with the gift over eliminated there was a simple life estate with a vested and indefeasible interest in fee in remainder.

In *Chapman v. Cheney*, 191 Ill. 574, the trustees appear to have had only a legal estate for the life of the son, upon trust for the son for life, with legal remainders to the son's children vesting in

interest at once (as the court construed the will), with a postponement of payment until the grandchildren reached thirty, and a gift over if any died before reaching that age. The gift to the grandchildren was valid and the gift over if they died under thirty was void. The court held, however, that the valid portions of the will should stand and be enforced. The characteristics noted in *Barrett v. Barrett, supra*, for this result were: (1), the absence of a trusteeship covering the remainder and gifts over; (2), the fact that the valid parts of the will included a life estate and a disposition of the remainder in fee simple, so that when the ultimate gift over was held void there remained a life estate and a vested and indestructible fee in remainder.

In *Johnson v. Preston*, 226 Ill. 447, land was (as the court construed the will) devised to trustees, the devise to take effect from and after the probate of the will and to continue thereafter for twenty-five years. This was held void for remoteness. The beneficial interests, however (as the court construed them), were *in presenti* to J. R. P. and G. H. P., and after the twenty-five years the land to go to them "or their heirs." This last phrase "or their heirs" seems to have been taken, following *Ortmayer v. Elcock*, 225 Ill. 342, as if it indicated merely that the persons named were to take the fee. There was an annuity given of \$100 a year for the twenty-five year period or the life of the annuitant. The heirs filed a bill for partition on the theory that the entire will, because of the limitations to trustees, failed for remoteness. The bill was dismissed and this was affirmed by the Supreme Court. It was clear to the court that the gift to the trustees was void for remoteness, but it was denied that the devise to the trustees was so connected with the limitations to the beneficiaries that the latter could not be enforced. The annuity was enforced as a charge against the land. This result seems proper enough. The trusteeship is the subordinate thing and the beneficial interest the main thing. There is no reason, therefore, why the former should carry down the latter. In *Barrett v. Barrett, supra*, however, the court speaking by Mr. Justice Hand, seems to suggest that the will was in effect entirely set aside, the property passing as intestate estate, and that the court did in effect find the trusteeship and beneficial interests so bound up together that when the former failed, the whole failed. The court says, p. 346: "The entire trust was held void and the estate intestate." We do not so understand the scope of the court's opinion in *Johnson v. Preston*.

In *Quinlan v. Wickman*, 253 Ill. 39, the trustee took an absolute interest in the trust estate upon trust for the testatrix's child Elizabeth for life, then to such of her children as reached thirty, with a gift over on two contingencies: (1), if Elizabeth died leaving no children; and, (2), if she died leaving children who died before they reached thirty; then over to Nellie absolutely. The gift to the children of Elizabeth at thirty was void; also the gift over on the contingency that Elizabeth died leaving children and they died under

thirty. A bill was filed by the heirs at law for partition on the theory that the whole will failed. The bill was dismissed. This was affirmed, because, while part of the will was void, yet the life estate in Elizabeth was valid subject to a valid gift over if she died without leaving any children. Hence, although the heirs had a vested reversionary trust pending the happening of Elizabeth's dying leaving children, yet since it was uncertain ever to vest in possession, they could not have partition. Here, then, the valid portions of the will were sustained although, (1), there was a trusteeship covering the invalid as well as the valid gifts; (2), although one valid gift was in the same clause and a part of the same sentence with the void gift over; and, (3), although the sustaining of the valid portion resulted in Elizabeth having a life estate and also a share as heir if the event of her dying leaving no children did not happen. It very likely appeared to the court that the will indicated a general purpose on the part of the testator to prefer Elizabeth and Nellie to the rest of his heirs at law and therefore made these special provisions for them by his will. To hold them all invalid would be to defeat that purpose completely and divide the property set aside for Elizabeth and Nellie between the heirs at law. Hence it probably seemed fair and reasonable to the court to sustain the special gifts for Elizabeth and Nellie as far as possible. This the court was able to do by giving Elizabeth her life estate and sustaining the gift over to Nellie in the one contingency of Elizabeth dying without leaving children. On the other hand, if Elizabeth died leaving children, the gift over would not take effect; Elizabeth would inherit part of the fee and be able to dispose of it to her children.

In the following cases the court held that the valid portions of the will failed along with the invalid.

In *Lawrence v. Smith*, 163 Ill. 149, the testator gave all his property to trustees to pay annuities to two sons and a daughter and to pay to each of three daughters, A. B. and C., \$600 annually during their lives, and upon their death, to pay \$300 to each of their children till such children reached twenty-five, and then to pay such children each \$10,000. The gift of \$10,000 was valid to each child born during the life of the testator. After the payment of all of the above sums the testator directed the principal of his estate to be paid to his grandchildren living. This was wholly void for remoteness. It was decided that all the above mentioned gifts failed because the ultimate limitation over was void for remoteness. This was affirmed. Here there was a trusteeship covering all the gifts. Furthermore, the gift of \$10,000 to each grandchild was contingent on such grandchild reaching twenty-five. Hence with the ultimate gift over eliminated, there was no absolute and direct gift of the corpus of the estate to any beneficiary. There were left merely the annuities, the payment of sums to the daughters for life and to the grandchildren till each reached twenty-five.

This situation presents some distinction from that presented in *Howe v. Hodge*, *supra*, *Nevitt v. Woodburn*, *supra*, and *Chapman v.*



*Cheney, supra.* In spite of this distinction, however, there hardly seems to be any good ground for holding the gifts inseparable so far as the language used is concerned. The result seems to be based rather upon the ground of what is manifestly just under all the circumstances, or is a guess as to what the testator would have desired had he known that the ultimate gift over was void, or perhaps both. On the question of the injustice of sustaining the valid limitations the court probably observed that to sustain the annuities and gifts to daughters and their children till each reached twenty-five, and the payment of \$10,000 to each grandchild living at the testator's death who reached twenty-five, would in fact tie up the distribution of the entire estate. The children, as the testator's heirs at law, would be ultimately entitled, subject to deductions for indefinite amounts, which would prevent the distribution as long as they lived.

Such a situation no doubt appealed to the court as unjust to the children. It no doubt also appealed to the court that the testator, under the circumstances, would have desired his children to receive the estate at once rather than that they should actually have an equitable ownership in it without being able to obtain a distribution. As the testator's children, who were his heirs at law, and their families were all treated substantially alike, there was absent the situation presented in *Quinlan v. Wickman, supra*, where the testator was especially preferring two of his heirs over the other children. According to Mr. Gray ("Rule Against Perpetuities," 2nd ed. §249c) our Supreme Court made a very poor guess as to what the testator would have intended had he known the ultimate limitation was void. If, however, guessing as to what the testator would have intended is permissible, it is on the whole hypercritical to complain that the court had not made as good a guess as one who says it should not guess at all thinks it ought to have made.

In *Eldred v. Meek*, 183 Ill. 26, there were, by clauses 4, 5 and 6, gifts of separate parcels to named grandchildren, contingent upon their reaching twenty-five. These were valid. Then by clause 10 there was a gift over if the grandchildren died under that age, to such children of them as reached twenty-five. This was void. It was held that because the gift over in clause 10 failed, the separate contingent gifts in clauses 4, 5 and 6 failed also.

The situation presented here was like that in *Lawrence v. Smith, supra*, to this extent, that there was a trusteeship covering all the gifts and the gifts which were valid were contingent upon the devisees reaching twenty-five, so that with the gifts over eliminated there was no absolute present gift to any devisee. Here, however, the testatrix's only heir at law seems to have been her child. The gifts to the grandchildren were gifts to the children of the testator's only child. Hence if the gift over were held void and the valid portions of the will sustained, the fee would not go to the grandchildren but to the testatrix's only child, subject to be divested if the grandchildren reached the age of twenty-five. If the gifts

to the grandchildren are entirely eliminated, then the daughter obtains the whole property as intestate estate. As the daughter is given one-fourth of the personal property absolutely, there would seem to be a clear purpose on the part of the testatrix to prefer her grandchildren by giving them specific portions of her estate when they reached twenty-five.

Following the apparent decision of the court in *Quinlan v. Wickman*, *supra*, we should suppose that the purpose of the testatrix would be carried out as far as it might be by permitting the specific gifts to the grandchildren to stand. It is difficult to see any ground in the supposed intent of the testator, or as a matter of justice to the daughter, for holding void the valid gifts to the testatrix's grandchildren who reached twenty-five.

*Owsley v. Harrison*, 190 Ill. 235, and *Pitzel v. Schneider*, 216 Ill. 87, really have no place in this list of cases.

In *Owsley v. Harrison* one share of the estate was to be kept together for two years after the testator's death, and one-half of such share was devised to the testator's children for life, and on the death of any one of them within the two years leaving issue, such surviving issue should take a life estate with a remainder to the heirs of their bodies. The remainder to the heirs of the body was void for remoteness. The life estate in the issue of the children did not take effect because no child had died during the two years. Hence when the ultimate gift failed there was left legal life estates in the testator's children, with a reversion in them in fee by descent. The two merged and the children were entitled to the fee simple at once. This is in accordance with the court's decision. The case, therefore, is not one where the valid portion of a will failed with the invalid.

In *Pitzel v. Schneider* there was a trust for the widow for life, of an annuity, and then a provision that the income should go to two children of the testator for their lives. Then there was a gift over to all the testator's grandchildren when they reached twenty-five. It was held that the last was clearly void and that this resulted in the whole trust failing and an intestacy. The language of the court on this point, p. 98, is very brief. It should be noted that the wife had died before the testator, so that there was no question about the validity of her annuity. The two children who received the income at the widow's death were the testator's only heirs at law. Hence when the ultimate gift failed they took as heirs at law the remainder, and having an equitable life estate also, they might well say that they had the entire equitable interest and the trusts should be wound up. The remarks of the court might be regarded as applicable to this precise situation.

In *Reid v. Voorhees*, 216 Ill. 236, there was no trusteeship. The third clause disposed of the rents of land to nephews and nieces for thirty years. If during that time any died without an heir, his or her share was to go to the living heirs. By the fifth clause all the property devised by the third clause went, after thirty years, to

the nephews and nieces or their heirs. The last was void for remoteness. This was held to carry with it the third clause, because otherwise a mere gift of rents for thirty years would be left with no further disposition of the property. Then the question arose about the second clause. That gave the residue of personal property to two nephews. There was no verbal connection between the gift by the second clause and that by the third clause. The properties given by each clause were distinct. Yet the court held that the second clause failed with the third and fifth.

This is a unique result. The second clause disposes of personal property to two nephews. The third clause disposes of real estate to other and different nephews and nieces. There was no trusteeship. Why should the failure of the gift in the third clause carry with it the gift in the second clause?

The only explanation seems to be that by holding the second section invalid the court was able to distribute the testator's property to the two nephews named in the second clause and the nephews and nieces named in the third clause in the proportions which the court believed the testator intended. The personal property devised by the second clause, and the real estate devised by the third were practically equal in value. If there was an intestacy with respect to the property named in both clauses then the two nephews named in the second would take one-half the personalty and one-half the real estate, which was about equal to the value of all the personalty named in the second clause. The other nephews and nieces would take one-half the personalty and one-half the realty, which was about equal in value to the real estate named in the third clause. This seemed to the court a practically equitable result.

On the other hand, if the third clause were held void and the second sustained, the two nephews named in the second clause would receive one-half the real estate devised by the third clause in addition to what they received by the second. This seemed to the court manifest injustice. They probably said to themselves that the testator would not have so intended had he known that the gift in clause three had failed.

In *Dime Savings Co. v. Watson*, 254 Ill. 419, the testator gave nine-tenths of the income of the estate held by trustees to nephews and nieces and the lineal descendants of any deceased nephew or niece until twenty years after the death of the last surviving nephew and niece, when there was to be a division among the testator's grandnephews and nieces. The ultimate gift over was void. If the rest had stood it would have left the nephews and nieces who were the testator's heirs at law to take the income for life, with a gift of the income to their lineal descendants for a further period, with the ultimate interest in the nephews and nieces as heirs at law. Thus the nephews and nieces would fail in securing an actual distribution because of the very slight interest of their lineal descendants, who might just as well take their chances of receiving an interest from their parents direct. Hence all the limitations above named were held to fail.

So in *Barrett v. Barrett*, *supra*, after a life estate to the wife, there was a gift of an undivided one-fourth to each of four sons for life, with a gift of each share to the children or issue of the sons for life, with a gift over of the absolute interest to the lawful issue and next of kin of grandchildren. There was a trusteeship over all the interests. The ultimate gift was void. If the other gifts had stood there would have been life estates to the children and grandchildren and an ultimate gift over by descent to the children. The situation would have been inconvenient for the children, since while having practically the entire interest, there could be no distribution, because of the life estate in their children. If the children took the entire estate at once their children's interests would be sufficiently protected by reason of the fact that they would naturally take ultimately from their parents. All the gifts were held to fail.

From these cases several situations emerge which tend to produce a given result, and a number of propositions can be affirmatively stated.

1. When the fee simple or absolute interest in property is disposed of by a valid provision either with (*Nevitt v. Woodburn*, 190 Ill. 283; *Chapman v. Cheney*, 191 Ill. 574) or without (*Howe v. Hodge*, 152 Ill. 252) the introduction of a preceding life estate and only the gift over which defeats the fee or absolute interest is void, the valid disposition will stand. If there is no trusteeship of the property disposed of absolutely, or in fee, this conclusion is aided (*Nevitt v. Woodburn*, *supra*; *Chapman v. Cheney*, *supra*), but it will be reached even when there is a trusteeship (*Howe v. Hodge*, *supra*).

2. On the other hand, where there is a succession of life estates, with an ultimate gift of the absolute interest which is void for remoteness, and the first life tenants are the heirs at law, all the limitations will fail and there will be an intestacy, and this will occur even where there is a trusteeship: *Reid v. Voorhees*, 216 Ill. 236 (as to the third clause); *Dime Savings Co. v. Watson*, 254 Ill. 419; *Barrett v. Barrett*, 255 Ill. 332).

3. Now suppose after a life estate there is limited a contingent gift over of the fee or absolute interest which is valid, and another contingent gift of the same property which is void, and the trusteeship covers all the gifts: (a) If the life tenants are the heirs at law who take ultimately and there is no plan to prefer some to others, then all the interests will fail and the heirs at law will take at once as upon an intestacy: (*Lawrence v. Smith*, *supra*). (b) On the other hand, if the instrument shows a plan to prefer some of the heirs to others by giving the life estate and the contingent interests to particular heirs and excluding other heirs entirely, then the limitations which are valid will stand in order to carry out such preference as far as possible: (*Quinlan v. Wickman*, *supra*). (c) In *Eldred v. Meek*, *supra*, no life estate preceded the contingent gifts and the testator seemed to have a plan to prefer the

children of his daughter to the daughter herself in respect to the gift of certain pieces of property devised to the daughter's children if they reached twenty-five. It would seem that the views acted upon in *Quinlan v. Wickman* might well have applied in this case to sustain the specific gifts of real estate to the children of the testator's daughter, which were valid, holding only invalid the gift over which was void for remoteness.

4. Several cases rest upon situations so special in character that they hardly warrant any generalization with respect to what facts will cause the valid limitations to fail along with the invalid: *Johnson v. Preston*, *supra*; *Reid v. Voorhees*, *supra* (as to the invalidity of the second clause).

5. In Gray's "Rule Against Perpetuities," 2nd ed., § 247, the author states what he considers to be the proper rule thus: "If future interests created by any instrument are avoided by the rule against perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument." He points to *Eldred v. Meek*, *supra*; *Lawrence v. Smith*, *supra*, and *Owsley v. Harrison*, *supra*, as in opposition to this statement, and insists upon the impropriety of the results therein reached.

It must now be plain from the entire line of cases on this subject in this state that Mr. Gray's view as above expressed has not been followed by our Supreme Court. It certainly looks as if it were never going to be. It is equally plain that our Supreme Court is not guided to its conclusion solely by a consideration of whether the limitations, according to the language used, are separable and independent, or dependent and part of a single scheme which must stand or fall together as a whole. What it not infrequently does is to obtain a result which it regards as manifestly just under all the circumstances. As a part of the inquiry regarding what is manifest justice the court undertakes to conjecture as to what the testator would have desired with respect to the valid dispositions if he had known that part of his will must fail, and were given no time to make a new one. In short, where part of the limitations fail for remoteness, the court exercises a discretion in determining whether it is advisable that any other part of the will shall also fail. The appeal by members of the bar in the present state of the decisions must be to the discretion of the court under all the special circumstances of each case.

ALBERT M. KALES.

CARRIER—PASSENGER—ACCEPTANCE—In *Todd v. Louisville & Nashville R. R. Co.*, 274 Ill. 201, it was held that to become a passenger, a person must be accepted as such by the carrier. The acceptance is in general implied from the acts and circumstances of the case. In the instant case, however, there was an express refusal by the carriers employees to accept the person as a passenger. They refused to sell him a ticket and attempted to prevent his boarding the train. It was held that he did not become a passenger by attempting, in spite of the efforts of the employees to prevent him, to

get onto the car after the train had started. The correctness of the decision seems not subject to question.

The person was excluded from the train on the ground he was intoxicated. The evidence as to whether he was in fact intoxicated was conflicting. The court intimates that even if the defendant was wrongfully excluded, the fact he was actually excluded by the authorized employees of the defendant nevertheless prevented his becoming a passenger. Some act of acceptance by the carrier is necessary to create the relation of passenger and carrier. The duty under which a common carrier rests to accept as passengers all persons presenting themselves for transportation in the proper way and under proper conditions, is a different thing from the actual acceptance of a person as passenger in a given case. The carrier may refuse to perform its duty to accept, in which case the person excluded is not a passenger, though he has an action against the carrier for the wrongful refusal to accept him as such.

The court holds that a condition of intoxication such as to make the person disagreeable, annoying or offensive to others, is a good ground for his refusal as a passenger.

The court says that attempting to board a moving train is not negligence per se, but is so if done in spite of a warning by the carrier's employees. The question of negligence seems, however, not to be involved, since plaintiff's intestate never became a passenger, and hence the defendant was never under any duty to exercise care in his behalf.

It would seem that there is in general no implied acceptance of a person as a passenger who gets onto a railroad car after the train has started, and is injured before reaching a place of safety. The implied offer to accept as passengers, persons who, with the intention of entering the car and becoming passengers, step onto the steps of a railroad passenger car while the train is stationary at a station, is withdrawn as soon as the train starts.

L. M. G.

## BOOKS AND PERIODICALS

A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW. By Joseph Henry Beale. Vol. I, Part I. Cambridge: Harvard University Press, 1916. Pp. lxxx, 189.

Professor Beale has approached a difficult task in a spirit worthy of the undertaking. He disclaims for his work any finality. He puts forth this installment as an essay, expressing the hope that when he shall have traversed the whole field he may return to this, his introductory portion, and that the completed work will include this part in a much improved form.

The work is planned upon a scale befitting the character of the subject. A general bibliography, with brief critical comments, occupies sixty-two pages of the present publication, and is followed by a few pages containing valuable suggestions as to a collection of books on the subject for a public law library and one for a private library. The elaborate bibliography purports only to cite treatises, periodicals, etc., dealing with the general subject, and leaves to subsequent parts bibliographies upon special topics, such as succession, marriage, etc. The brief critical comments incorporated in the bibliography are most useful. They not only set forth Professor Beale's estimates of the works referred to, but contain valuations by other students of the subject. Under Story's classical book, for example, is cited a most laudatory opinion from the American Jurist in 1834, a less enthusiastic contemporary appraisal from the London Law Magazine and Review, and a just and balanced modern judgment from Professor Dicey.

A brief examination of the bibliography has revealed the absence of some items which should appear in a complete bibliography: Lafayette, "Projecto de codigo do direito internacional privado," Rio de Janeiro, 1910, a plan for a code prepared by the author for the Brazilian government; also to Rodrigo Octavio's "Codification," referred to by Professor Beale, should be added his "Direito do Extrangeiro," 1908. To the Bohemian Professor Jan Krcmář's "Introduction," cited, should be added the same author's, "The Foundations of the Theory of Bartolus and Baldus concerning International Private Law," Prague, 1910.

The chapter on the scope and name of the subject amply justifies the title that Professor Beale has chosen. An American writer cannot properly use the word "international" in connection with the applicability *inter se* of the laws of the states of the Union. On the other hand, while "international" is inaccurate, it does call attention to the ideals of this branch of law. Professor Beale does well to adopt the alternative form of title.

The history of the subject and the statements of current doctrine are most valuable and interesting chapters. They open new mines to the student who has confined his study to the English and American authorities. They are so stimulating and so provocative of thought with reference to fundamental questions that we could

wish they were more elaborate, even at the expense of curtailing the final chapters on analytical jurisprudence. Indeed, it is believed that some expansion is necessary in certain parts of the chapter on the history of the subject for the purposes of clearness. The "statutes," personal and real, for example, are likely to carry a connotation in the case of an American or English reader which they fail to do in the case of a Frenchman. It may be doubted whether the author makes sufficiently clear to the uninstructed reader that "statute" means any law not embraced within the imperial or Roman law, whether it is what we should call statutory or common law, that it includes custom, legislation, and ordinances—everything, in fact, except the common law or imperial law of Europe: (Frederick Harrison, "The Historical Side of the Conflict of Laws," (1879), *Fortnightly Review*, xxxii, 559). And with respect to some of the modern theories, such as those of Pillet and Zitelmann, we might wish that Professor Beale had given us more of the substance of their doctrines in his own words rather than in literal translations from their writings or from French and German reviewers of their doctrines. A translation of such a word as "subjektiv," to speak of but one matter, fails utterly to convey the meaning in the mind of the German writer.

Sometimes one feels that Professor Beale has stated propositions rather too positively. One instance of such a statement is made at p. 18, where it is said that the study of the law of the states which preceded Rome is of "no historical importance," though in a note cited by Professor Beale to this passage an Italian writer is quoted who devotes ninety-four pages to the subject, and a Belgian who devotes thirty-five pages to it. The recent studies of French and German jurists upon pre-Roman law have been fruitful of results in general jurisprudence, and the comparative method cannot afford to neglect such material. At page 57, the author says that "all Europe is agreed upon the principle of nationality as the basis of personal rights." The statement is believed to be somewhat too sweeping. Dr. Baty says ("Polarized Law" (1914), p. 18) that this principle is not universally adopted in Europe but that the principle of domicile still survives for many purposes in Denmark, Switzerland, Russia, and Norway, and his statement is borne out by Meili: ("International Civil and Commercial Law," translated by Arthur K. Kuhn (1905), pp. 114-115 and 122-123).

At p. 140, it is said that in England "a law common to the realm was imposed in the twelfth century, developed in court at the outset by judges whose experience was in the old Germanic folk-courts, developed from its archaic beginnings in complete isolation from contact with other systems of law; and it had its first experience as a system governing more than one legal unit when it was extended by colonization into America." The common law can hardly be said to have been "imposed" in the twelfth century or at all, nor is it clear that there was any "common" law of England so early as the twelfth century. It was rather a development from



customs, royal orders, writs, and it became a common law of the realm later than the twelfth century. Such men as Glanvill in the 12th Century, and Martin Pateshull and William Raleigh in the early 13th Century, were not judges whose experience was gained in the "old Germanic folk-courts." The king's justices were at this time ecclesiastics with some knowledge of the civil and canon law, and probably never sat in a popular court of the hundred or shire. English law was not developed in "complete isolation from contact with other systems of law." What of its conflicts with the canon law, for example? Ireland was a "legal unit" for centuries before the settlement of America, and Mr. Maitland's interesting essay in the *Harvard Law Review* on the Register of Writs prepared for Ireland shows how early English law was extended there: (3 *Harvard Law Review*, 97, 167 and 212). Professor Beale, we believe, would be the last man to justify the view of the development of English law set forth in the sentence criticized, if his purpose was to expound its history in a judicial temper. His keen interest in developing his main point—the isolated character of English law—has inadvertently led him into the attitude of the advocate and has led him to make an over-statement of the facts regarding English isolation. In truth, the isolation of English law came rather late, with the establishment of a distinct legal profession from whose ranks the judges were drawn.

Professor Pound's very interesting and suggestive address before the Massachusetts Historical Society upon Justice Story—to mention one only of numerous authorities—should have served somewhat to qualify the statement on p. 141 that "the English law under which they (the colonists) had been bred, remained their law under their new skies." In the early days of the Massachusetts Bay Colony, at least, it was not the common law of England that was enforced, but the Mosaic law. Possibly as a matter of juristic theory we must hold the Puritan colonists to have been subject to the common law, but as a matter of historical fact, the common law came to them, or they came to it, by something very like a "reception."

Book II of the present portion of the work is entitled "Preliminary Consideration of Jurisprudence." It is full of acute reasoning and of subtle analysis. At times, as in the discussions of law and fact at p. 136, of the part played by judicial decisions in legal systems at p. 147, and of the part played by lawyers and jurists in the development of the law at p. 150, the author reaches a very high plane of legal writing. The brief discussion of "the law of the flag" at page 121 will doubtless be elaborated in subsequent parts of the work, and the difficulties inherent in a situation where there is no general "law of the flag," as in the United States, explained and properly documented. The very satisfactory treatment of the question on which two candidates for the Presidency clashed twelve years ago, whether there is or is not a federal common law (p. 127) possibly neglects some rather difficult situations, though one must

agree with the result. When a federal court applies the common law to an obligation, it no doubt ought to apply the law of the jurisdiction where the obligation arose, just as a state court would do. But if the defendant to a commercial obligation incurred in New York is sued in a federal court in California, he may not show that the common law of New York is different from that of California. The law which is enforced by the federal courts is a uniform common law evidenced by federal and not by state decisions. On the other hand, if the action were brought in the state court in California, it would apply the common law of New York. The doctrine is anomalous, in that the federal courts allow the common law of a particular state to be proved only by the federal decisions—an aberration from sound principle, though not inconsistent with the theory that after all they apply the law of the place where the obligation was incurred. It is worthy of notice, however, that Justice Story, the author of the opinion in *Swift v. Tyson*, never doubted that there was a common law of the United States. ("Life and Letters of Joseph Story," by W. W. Story, I, 299).

Professor Beale in characterizing "dynamic rights" speaks of them as coming to an end by satisfaction or by "destruction": (pp. 181 *et seq.*). It is not entirely clear what he means by destruction. Rights arising out of contract, which we believe Professor Beale includes under dynamic rights, are generally regarded by courts and lawyers as indestructible, though the remedies for the enforcement of the rights may be destroyed by lapse of time. Certainly the breach of a contract cannot be said to destroy a right in the usual meaning of language. It is conceded that for the purpose of analytical jurisprudence, Professor Beale or any other person may define or describe rights as he pleases. It is after all only a question of classification or legal card-indexing. But the reader is entitled to insist that the definitions should be clear, and one reader at least finds it hard to understand just what is meant by the destruction of a right.

A few mistakes in proof-reading occur. At page xvii, "Harvard Law Review, xvli," should be xvii; at pages 135 and 136, Sir Frederic Pollock is twice spoken of, though his name is correctly spelled at page 72; at page xix, "M. J. Farelly" should be "M. J. Farrelly." Savigny's classical treatise, though correctly named in the bibliography at page xlvi, is erroneously cited at page 88.

The criticism of trifling faults in the details of workmanship should not leave an impression that the book as thus far published is not worthy of its distinguished author. On the contrary, this small portion gives promise that the completed work will be the most important achievement of American legal scholarship since Professor Wigmore's book on Evidence. The most difficult part for an American to have written is the portion before us and it has been excellently done. The splendid essays already published by the accomplished and learned author in the Harvard Law Review upon problems arising in our own law in connection with this sub-

ject provoke our expectations for the next installment where the author will stand upon ground more familiar to his American and English readers.

ORRIN K. McMURRAY.

University of California School of Jurisprudence.

**THE POSTAL POWER OF CONGRESS: A STUDY IN CONSTITUTIONAL EXPANSION.** By Lindsay Rogers. Baltimore: The John Hopkins Press, 1916. Pp. 189.

The author, who is adjunct professor of political science in the University of Virginia, has written an interesting and valuable account of the development of the postal powers of the United States, from the timid early days, when it was doubted if the federal government could do more than carry the mail over such highways as it might find already in use, down to the bold claims of today that the country's entire railway system may be publicly acquired under the postal clause. Of course, the span between these extremes of doctrine represents not only a vast change in social needs but an even greater one in the conception of the relation between the federal government and the states, and under half a dozen appropriate chapter heads the course of this development has been adequately traced in both its legal and historical aspects.

The author is particularly to be congratulated upon the use he has made of the debates in Congress at various periods to show the emergence and growth of certain theories of the postal power. The constitutional views of members of Congress do not of course have the authority of the utterances of courts, but in many cases they have significance in marking out the battlefields of doctrine where a generation later a Supreme Court decision has sealed the victory, and almost always they embrace a wider field of legal conjecture than a court dealing with a concrete case would think permissible. In governing bodies composed largely of lawyers, like those of America, legislative discussion in a host of constitutional questions has pointed the way to judicial interpretation, and few plausible doctrines escape exploitation in such debates. The writer who first has the time and patience to go through the annals of Congress and bring together what has been said there about the commercial clauses of the Constitution will rescue from oblivion a wealth of useful and interesting material for the lawyer and historian.

Professor Rogers examines all of the more promising possibilities of the postal clause except the expedient of raising the weight limit so as to include most articles now sent by freight. If carload lots may be carried by parcel post, and such carriage made a government monopoly, federal acquisition of the railroads will only add form to what in substance would already be a governmental operation.

In a few minor points it is possible to disagree with the learned author: as for instance that the construction of a government railroad in the territory of Alaska can be regarded as an exercise of

the postal power granted by the Constitution: (p. 80); that the Chinese Exclusion Cases: (*Chae Chan Ping*, 130 U. S. 581; *Fong Yue Ting*, 149 U. S. 698) were decided upon the theory that the United States possesses powers inherent in sovereignty and not incidental to any granted powers: (p. 108); that Attorney-General Bonaparte's opinion to President Roosevelt in 1908, upholding the Postmaster-General's power to exclude from the mails publications counseling serious crimes, sanctioned the lodging of *arbitrary* discretion in the latter: (p. 120); that the federal government has greater power to exclude articles from interstate commerce than from its own mails: (pp. 128, 174); and that, because some foreign governments with unlimited powers use their postoffices for purposes quite unconnected with the transmission of goods, credit, or intelligence, these purposes are therefore logical parts of the modern *postal* power: (pp. 33, 34, 154). The reference to *Boyd v. U. S.*, 116 U. S. 616, for the history of the fourth amendment (p. 124) should be supplemented by references to later cases and authorities greatly modifying some of the views there expressed. See *Hale v. Henkel*, 201 U. S. 43, 71-74, and cases cited, and 3 Wigmore, "Evidence," Secs. 2263-64, 5 *ibid.*, Sec. 2264.

Of special interest is chapter VII upon the extension of federal indirect control by exclusion from the mails. Whether one agrees with the author's conclusions or not, his discussion of the problems involved is acute and candid and will help clear thinking upon the subject. More monographs like Professor Rogers's are needed in the field of public law.

JAMES PARKER HALL.

University of Chicago Law School.

THE SOCIAL LEGISLATION OF THE PRIMITIVE SEMITES. By Henry Schaeffer. New Haven: Yale University Press, 1915. Pp. xiv, 245.

This book is a comparative study of certain legal institutions of the primitive peoples of Arabia, Babylonia, and Israel. The institutions studied are indicated by some of the chapter headings: Agnation; The Goel or Next of Kin; Slavery; Interest; Pledges and Security; Poor Laws; Sabbatical Year; The Year of Jubilee; Taxation and Tribute. A comparative study of each of these institutions among the Hebrews, the Babylonians, and the Arabian tribes is made by the author. For example in the chapter on the "Goel" or Next of Kin, the function of the Hebrew next of kin in the inheritance of property is first considered and the narratives of the sale of Hanameel's field and of Boaz and Ruth are especially discussed. The right of redemption as disclosed in Babylonian mortgages and deeds is then adverted to, and finally the "wali" or next of kin of Arabic literature is treated. So in the chapter on the Hebrew year of Jubilee, which the author regards as representing a transition stage between primitive communism in land and the beginnings of private land ownership, he cites, for com-

parison, evidences of collective ownership from Babylonia and the Arab tribes.

The author is not always critical in his comparisons. In comparing customs presenting points of similarity found among the ancient Babylonians and an Arabian tribe in comparatively recent times not much can be predicated on mere similarity without consideration of the respective states of general culture and features of social organization. So, too, the author does not distinguish between conscious innovations and customs which are the result of slow and long continued growth and accretion. Rules of collective ownership of land with a long history, for example, are discussed as on a par with Ezekell's plan of allotment, a purely academic ideal. Indeed the term "social legislation" has a too well-defined modern significance to be at all appropriate as a designation of the customs of primitive peoples which are something very different in fact from anything denoted by the term "legislation."

Full use has been made of the literature, including the most modern studies and the discussions on all the topics are suggestive and of great interest to students of early and comparative law. They will be well repaid by its perusal.

EDWARD LINDSEY.

Warren, Pa.

**A SELECTION OF CASES UNDER THE INTERSTATE COMMERCE ACT.**  
By Felix Frankfurter. Cambridge: Harvard University Press, 1915. Pp. vii, 706.

The preface states that the selection has been prepared for use in the Harvard Law School. The purpose is to facilitate organized, systematic study of the Act to Regulate Commerce as one of the most vital branches of the law. The author considers such study more imperative now that the Interstate Commerce Act and the experience of its enforcement have served as the basis for the regulation of interstate industries under the Federal Trade Commission Act as well as for the regulation of state utilities of all kinds.

The appearance of this book of cases will be welcomed by the teaching profession. That the want of such a collection has discouraged systematic instruction on this important branch of business law is apparent to all who have attempted to conduct classes on the subject.

Of the selections, 77 are from as many decisions of the Supreme Court of the United States, 27 are from decisions of Interstate Commerce Commission, and 6 from inferior federal courts. The cases are presented rather fully. Where parts of opinions are omitted, the editor usually indicates the character of the material in the omitted portions. Foot notes are appended to many of the cases calling attention to cases not in the selection, which bear on the same point.

The selections are grouped under twelve topics, which in turn are arranged in four chapters. The chapters are entitled as follows: Scope of Commerce Regulated by the Act; Duties of "Carriers"

Under the Act; Functions of the Interstate Commerce Commission in the Enforcement of the Act; Function of Courts in the Enforcement of the Act. A topical analysis of this character is undoubtedly of great value to all who will use the book. The practical value of the selection would have been increased by the addition of an index.

At the beginning of almost every case, the editor has included the names of the parties appearing before the tribunal rendering the decision, and of the counsel of record for all of the parties. One report of the Interstate Commerce Commission is preceded by a list of parties and counsel extending over more than a page. It is difficult to understand on what ground this use of space is justified, especially since the book is intended for students.

It is needless to say the material is up-to-date. It is also comprehensive. Few of the cases important for their interpretation of the law as it now stands are omitted.

W. D. K.

## ARTICLES IN PERIODICALS

JURIES OF LESS THAN TWELVE AND VERDICTS BY MORE THAN A MAJORITY OF JURY IN CASES IN STATE COURTS UNDER FEDERAL STATUTE. *Editorial*. 2 (N. S.) Va. L. Rev. 321.

THE ADMINISTRATION OF JUSTICE IN THE CANAL ZONE. *Wm. K. Jackson*. 4 Va. L. Rev. 1.

JUDICIAL LIMITATIONS AFFECTING VENUE OF TRANSITORY ACTIONS. *H. D. Minor*. 4 Va. L. Rev. 21.

IS TELEGRAM WHICH ORIGINATES AND TERMINATES AT POINTS WITHIN SAME STATE, BUT WHICH PASSES IN TRANSIT OUTSIDE OF THAT STATE, AN INTERSTATE TRANSACTION? *William Overton Harris*. 4 Va. L. Rev. 35.

THE EIGHT-HOUR RAILWAY WAGE LAW. *Harry T. Smith*. 4 Va. L. Rev. 83.

SOME VIEWS ON THE RULE OF STARE DECISIS. *W. M. Lile*. 4 Va. L. Rev. 95.

RELATION OF EQUITY ADMINISTERED BY COMMON LAW JUDGES TO EQUITY ADMINISTERED BY CHANCELLOR. *W. S. Holdsworth*. 26 Yale L. Jour. 1.

THE TRANSFER OF REMAINDERS—WITH MORE PARTICULAR REFERENCE TO THE LAW OF MISSOURI. *Manley O. Hudson*. 26 Yale L. Jour. 24.

NEW TRIAL AT THE COMMON LAW. *William Renwick Riddell*. 26 Yale L. Jour. 49.

METHODS OF ESTIMATING DEPRECIATION IN THE VALUATION OF PUBLIC UTILITIES FOR RATE MAKING PURPOSES. *H. M. Wright*. 5 Calif. L. Rev. 1.

THE EXTRALATERAL RIGHT—SHALL IT BE ABOLISHED? *Wm. E. Colby*. 5 Calif. L. Rev. 18.

INALIENABLE RIGHTS OF PROPERTY. *Charles M. Bufford*. 5 Calif. L. Rev. 37.

FIELD'S WORK AS A LAWYER AND JUDGE IN CALIFORNIA. *Orrin K. McMurray*. 5 Calif. L. Rev. 87.

FIELD'S OPINIONS ON CONSTITUTIONAL LAW. *William Carey Jones*. 5 Calif. L. Rev. 108.

LEGISLATIVE FAILURE AND REFORM. *David P. Barrows*. 5 Calif. L. Rev. 129.

THE CALIFORNIA WATER RIGHT. *R. H. Hess*. 5 Calif. L. Rev. 142.

THE IDEAL OF AN IMPERIAL CONSTITUTION. *J. Berriedale Keith*. 36 Can. L. Times 831.

SOCIOLOGY AS A PREPARATION FOR LAW. *Frank Wilson Blackmar*. 23 Case and Comment 443.

THE FEDERAL FARM LOAN ACT—I. CONSTITUTIONALITY. *T. J. Walsh*. 83 Cen. L. Jour. 329.

INDEPENDENT WRONGDOERS CAUSING OR CONTRIBUTING TO A NUISANCE. *N.C. Collier*. 83 Cen. L. Jour. 404.

# ILLINOIS STATE BAR ASSOCIATION NOTES

By R. ALLAN STEPHENS<sup>1</sup>

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## ILLINOIS IN THE AMERICAN BAR ASSOCIATION

The American Bar Association at its last annual meeting provided that the president of each state bar association, recognized by the American Bar Association and which accepted such provision, should become a member ex-officio of the general council. The Illinois State Bar Association accepted such provision of the American Bar Association and President Early attended the first meeting of the council as representative of the Illinois State Bar Association at Philadelphia January 6, 1917. Up until December 1, 1916, the state bar associations of District of Columbia, Indiana, Massachusetts, Minnesota, Missouri, Rhode Island, and Illinois were the only organizations which had accepted the provisions of the legislation. The legislation also provided that the secretaries of such state bar associations should become members ex-officio of the local council for such states.\*

## FOURTH SUPREME JUDICIAL DISTRICT MEETING

The meeting for the purpose of organizing the federation of local bar associations for the fourth supreme judicial district was held in the circuit court room at Monmouth on December 16, 1916. While there was a good attendance of lawyers, owing to the poor transportation facilities only five counties were able to be represented. However, the organization was perfected, and Judge Lyman McCarl of Quincy was elected president; G. W. Nelson, Esq., of Petersburg, vice-president; Jesse Heylin, Esq., of Canton,

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1. Associate Editor of ILLINOIS LAW REVIEW and Secretary of Illinois State Bar Association.

secretary; Earl P. Fields, Esq., of Monmouth, treasurer; and O. W. O'Hara of Carthage as member of the executive committee. President Albert D. Early, Messrs. Voigt and Wilson of the board of governors, and R. Allan Stephens, secretary of the State Bar Association, were present. The proposed law prohibiting corporations from assuming to practice law was presented by Mr. Voigt, and after a thorough discussion the federation went on record as being in favor of the proposed legislation.

The question of the abolition of the rule in Shelley's Case was considered, and on vote it was unanimously decided to recommend to the members of the legislature for the fourth district that an act abolishing such rule be passed. A similar resolution had been previously passed by the federation of local bar associations for the second district; and wherever the matter has been discussed among the practicing attorneys of the state, they seem to agree that there is no real reason for its continuance as the law in this state. The acceleration of contingent remainders has met a like fate in all of the discussions.

Among the other amendments to our present laws suggested and approved by the federation were the following: Changing the time of sales of real estate until after the expiration of the time of redemption; making summons in common law suits returnable after a certain number of days instead of at a term of court; legalizing the administration of estates where guardians ad litem have not been appointed; and permitting non-resident heirs to nominate administrators.

It was decided to make the meetings of the federations annual affairs and the officers were directed to carry out the plans of the association.

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#### FIFTH SUPREME JUDICIAL DISTRICT MEETING

The officers of the Illinois State Bar Association experienced a new sensation at the meeting of the local bar associations of the fifth supreme judicial district held at Peoria, January 13. It has been customary for the members of the legislature to pay little respect to the recommendations of the State Bar Association. However when the lawyers of the local bar associations met at Peoria, one of the leaders of the legislature attended and informed the officers that as he considered the local association the representative of the lawyers, he would be glad to follow any recommendations they might make as to matters coming up before the legislature.



When the roll was called it was found that six of the ten county bar associations in that district had delegates present. President Chester M. Turner of the federation presided and with such men as Judge Wead of Peoria, Judge Puterbaugh of Peoria, Judge Thompson of Galesburg, Judge Lardin of Ottawa, and M. J. Daugherty of Galesburg taking part in the discussions, the meeting was one of the most profitable held under the auspices of the State Association.

As result of the discussions the federation went on record as being in favor of amending the present statutes so as to make a summons returnable within a fixed number of days instead of to a term of court, but opposed an amendment allowing a summons to be served by other than the sheriff. The federation also favored the bill prohibiting corporations from assuming to practice law, and the proposed bill providing for sale of real estate after the equity of redemption has run. The amending of the administration act so that a foreign heir can nominate an administrator, and the bill amending the same act to validate wills which have been probated without the appointment of a guardian ad litem were unanimously approved. A discussion of the abolition of the rule in Shelley's case resulted in a vote of twenty-four to six in favor of abolishing the rule. The proposed bill to prevent destruction of contingent remainders was approved by a fifteen to thirteen vote.

An interesting discussion was had over the recent ruling of some of the circuit judges that the last public election notice in chancery proceedings made within less than forty days of the term to which the summons was returnable must be made in the last regular publication issued before the term. The board of governors of the Illinois State Bar Association were requested to see if the uncertainty resulting from such decisions cannot be cleared by a legislative enactment.

The attention of the federation was also brought to the fact that the law requiring posting of notices should be revised, as there is no further occasion for the requirement that notices should be posted in the most public place in the county, and it was suggested that an act requiring notices to be posted at the court house and at the premises involved, in addition to the customary newspaper publications, should be sufficient. As one attorney expressed it, "the present law makes more perjury than any other act on our statute books."

The following officers were elected for the ensuing year: President, Chester M. Turner, Esq., of Cambridge; vice-president, W. G.

McRoberts, Esq., of Peoria; secretary and treasurer, Wallace W. Black, Esq., of Lacon; member of state executive committee, Hugh E. Wilson, Esq., of Peoria; executive committee: Carey R. Johnson, Esq., Princeton; Cornelius Reardon, Esq., Morris; R. C. Morse, Esq., Kewanee; M. J. Daugherty, Esq., Galesburg; A. T. Lardin, Esq., Ottawa; Jay H. Magoon, Esq., Lacon; E. Bentley Hamilton, Esq., Peoria; James E. Taylor, Esq., Hennepin; J. H. Rennick, Esq., Toulon; W. H. Foster, Esq., Eureka.

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## THE SPIRIT OF CODE PLEADING

By GEORGE P. COSTIGAN, JR.<sup>1</sup>

We have had codes of procedure for many years, but it is only recently that we have paused to consider intelligently their working and their reformation. Much in the way of improvement has been suggested, yet at the same time no specific program that commends itself unreservedly to all of us has been produced. Perhaps after all it is not the gun that is inefficient but the man behind the gun. Perhaps it is not the code that is at fault, but instead, it is the mishandling of it, the inefficient manipulation and application of it, that is to blame for what annoys us about its working. Let us pause, then, to consider just what changes in pleading the code was intended to accomplish, just to what extent and why it failed, if it did fail, to accomplish its aim, and just how lawyers and judges may proceed to make the spirit of code pleading animate its embodiment.

At the very start the writer may, perhaps, set the subject in its proper light by quoting two remarks.

The first was made by a Denver lawyer, now deceased, to a brother lawyer, who told it to the writer. It was a remark made just after Colorado had given up the common law pleading system by the adoption of the code system and when so many of the lawyers who had grown up under the old system were feeling that the law had been shaken to its foundations. The remark was in reply to an inquiry as to the course which the Denver lawyer would take in drafting his first complaint under the code. His statement was: "I shall just have my client write a letter to the judge and shall file that as the complaint." This remark, which to the lawyer who uttered it seemed to carry on its face the conclusive proof of the utter degradation and imbecility of the new system of procedure, has always seemed to the writer to be an intuitive appreciation of the real spirit of the code. Had the courts but realized that the

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plaintiff's complaint was in effect a letter to the judge and to the opposite party designed to set out the plaintiff's grievance sufficiently for the judge and the opposite party to grasp the nature of that grievance and for the opposite party to set out in his explanatory letter to the judge his denial or justification of his acts, how much of technicality would have been avoided!

The other remark was quoted by Mr. Justice Stephen in an article in the *Law Quarterly Review*. He said:

"The late Lord Wensleydale, while pitying the hard lot of a man who was ruined because his pleader had supposed his remedy to be trespass instead of case, added: 'No doubt it is hard on him. The declaration ought to have been in case. If it had been, he would have won; but if the distinction between trespass and case is removed, law, as a science, is gone—gone.'"<sup>2</sup>

That statement of Lord Wensleydale seems very foreign to a code pleader's ideas, but a little acquaintance with the code pleading cases shows that many of the judges who were entrusted with the task of interpreting and applying the code were under the influence of just such a notion. They felt that to preserve the science of law they must keep as much of the old common law pleading as they could, and they failed to interpret and apply the code in its essential spirit. Fortunately there were some judges who gave the code a sympathetic application and it looks today as if we are all going soon to unite to make civil procedure as simple and as sensible as the framers of the code intended it to be.

In order to get some idea of what should be done, it is desirable to determine just what an application of the code in its true spirit would accomplish in the way of simplifying and rationalizing pleading. We start with the proposition that the pleadings are the statements made by the parties in order to enlighten each other and the court, or court and jury, as to just what question is up for decision. They are the letters to the judge written by both parties about the transaction to be investigated. And the first thing we have to notice is that, with the exception of certain "special proceedings," such as mandamus, prohibition, quo warranto, and habeas corpus, which require special treatment, all claims to be investigated are grouped by the code in one general form of civil action with a limited series of pleading steps, i. e. all grievances of the plaintiff are presented in one form of an open letter to the judge, called a complaint or petition, and all admissions, denials and new allegations of the defendant are presented in one form of letter to the judge called

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2. 1 *Law Quar. Rev.* 1.

an answer, answer and counter-claim, or answer and cross-complaint, and, if the code calls for one, all admissions and denials of the plaintiff to the matters in the defendant's letter are put in a reply letter by the plaintiff called a replication or reply. There may be other letters to the judge called demurrers, which say that even if what the other party says is so, he has no cause of action or has no right to bring together the different grievances which he states, or has no right to complain about the defendant alone or to complain in one action about the objecting defendant and some other defendant, etc. There may be still other letters called motions which ask for various procedural orders and preliminary relief. This one form of action has various general rules to govern it regardless of the variety of grievances presented and relief sought under it, and it was meant to be as simple as any all-embracing form of action could be made. Whether a plaintiff's cause of action was in tort or on a contract, was *légale* or was equitable, or whether he joined in one "letter" several causes of action, he was to be given a fair chance to get to trial on the merits, if on the face of his letter he appeared to have a cause of action, and the question of pleading was to trouble him only to the extent that he must state real grievances plainly and concisely, that he must join in the action everybody who should be joined for the case to be tried satisfactorily on its merits, that he must join only those whose interest in the controversy made it proper to join them, and that he must unite in one letter to the judge only those grievances which the code allowed to be considered together. If he stated a grievance which on its face was a sound grievance, then he was to be entitled to a trial on that grievance no matter whether he was fully advised as to the proper relief he was entitled to and asked for that relief or not. The defendant was to be given similar liberal treatment. Law and equity were to be administered by one court and in the one action, and the unessential mistakes of the pleaders were to be ignored. Pleading decisions were to be "good-natured decisions," and justice administered without unnecessary technicality was to be the immediate result. Such was the purpose sought to be served by the code.<sup>3</sup>

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3. It is clearly settled that "The new system has not produced, and was not intended to produce, any alteration of, nor direct effect upon, the primary rights, duties and liabilities of persons created by either department of the municipal law. Whatever may have been the nature or extent of these primary rights and duties, from whatever causes, facts, acts, or omissions they took their rise, whether they were denominated legal or equitable, they remain exactly the same as before. The codes do not assume to abolish the

Now why has code procedure, which started on its way with such lofty purposes, failed of its high aim? One reason for that failure is that the looked for good-natured decisions were often ill-natured, because lawyers and judges trained under the common law system were so hostile to the new procedure that they either deliberately misapplied it or else from want of sympathy failed to understand it.

Take for instance, the questions (1) whether under the one form of civil action a plaintiff who has alleged facts constituting one cause of action can so amend his complaint as to allege another and different cause of action and abandon the first stated cause; and (2) whether under that one form of action, a plaintiff who has set out facts which if true clearly constitute a cause of action at law, and who has asked only equitable relief, or which constitute a cause of action for relief in equity and who has asked only legal relief, or which constitute a cause of action entitling plaintiff both to legal and equitable relief or to either that he asks, and who has asked in the complaint for a different relief from the one to which the facts proven at the trial show him to be entitled, can have that relief which, if he had asked for it, he could have had. Question (1) is a question of the flexibility and adaptability of the one form of civil action and directs our attention to the whole problem of amendability of complaints. Question (2), on the other hand, is a question of the inherent power of the court to give appropriate relief when, through the plaintiff's fault or his attorney's fault, he has misapprehended the relief to which he is entitled and therefore has failed to ask for it.

The whole question of amendments has been made unnecessarily complicated. The spirit of the code is clearly to encourage the parties, once they are in court, to settle all controversies which seem properly triable in the one action and which, under the code, may be united in one complaint or be brought in by counter-claim or cross-complaint. Accordingly it would seem to be clear that the spirit of the code requires that permission for the amendment

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distinctions between 'law' and 'equity' regarded as two complementary departments of the municipal law; not a clause is to be found which suggests such a revolution in the essential nature of the jurisprudence which we have inherited from England. The principles by which the courts determine the primary rights and duties of litigants remain unaltered; upon the acts or omissions which were the occasion of a right called equitable, the same right is still based, and is still properly termed equitable; from the acts or omissions which were the occasions of a right called legal the same right still arises, and is still with propriety termed legal": *Pomeroy's "Code Remedies"* (4 ed.) § 8.

of a complaint be given to a plaintiff who has sued on one cause of action and who wants to amend to join one or more other causes of action of a nature which, under the union of causes of action sections of the code, he could have joined in the complaint at the start or which would have been joinable had they existed then and which, since they originated later, are now being offered in a supplemental as well as amended pleading. Not only so, but the spirit of the code would also seem to sanction a still later amendment whereby the original cause of action should be dropped and new causes should be added by the amended or amended and supplemental complaint, if all the latter causes are properly joined in one complaint and remain the only ones to be tried. And if the spirit of the code sanctions that, it seems only a reasonable conclusion that the same spirit of the code would approve the substitution by amendment, or even by amended and supplemental pleading, of any cause of action in the place of the one on which the suit was based, whether it could have been joined with the original cause of action or not. Since, by hypothesis, the old cause of action is to be abandoned, there is no reason why the new one to be substituted for it should be one which could have been joined with it in one complaint. The spirit of the code clearly requires that when parties are in court and either one has a cause of action against the other which can be determined without any violation of the joinder of causes of action and counter-claim and cross-complaint sections of the code, or of any of those sections, the court shall permit the party having the grievance to present it in the action already started rather than compel him to go to the useless delay and expense of starting a new action.

But when this is said, it needs also to be said that a court permitting such great freedom of amendment as is here advocated must not regard the resort to amendment to introduce new causes of action as a means of depriving the opposite party of such defenses as he would have had if a new action were started on the new cause of action at the time of amendment filed. The spirit of the code calls for liberal amendment privileges, but it also calls for the full preservation of those defenses to the newly introduced causes of action which would exist if amendment were denied and a new action were started at the time of the filing of the amendment. Such defenses as the statute of limitations should not be deemed obviated as to new causes of action introduced by amendment just because by long established usage amendments have

related back to the time of the filing of the complaint or other pleading so as to cut off all defenses not existing at that time. The spirit of the code is clearly against any such technical judicial pettifoggery, for it seeks to subordinate questions of form to questions of substance—questions of procedure to questions of the merits of the case—and however otherwise it once was, it seems clear today that the defense of the statute of limitations which exists to any cause of action ought not to be deemed to be taken away from any party merely because through a successful amendment of a pleading in an already started action, the cause of action has to be litigated in that action and it happens to have been begun at a time before the statute of limitations defense accrued. Those courts which deny the introduction of such a new cause of action by amendment because to permit such introduction would cut off the defense of the statute of limitations and those other courts which permit the amendment in order to cut off such defense of the statute fail to appreciate the spirit of the code and the right of the legislature to determine for the courts that the statute of limitations is based on sound policy. The spirit of the code calls for the liberal permission of amendments of pleadings so long as such amendments are sought in good faith, are not actually unnecessary and are not likely to complicate the action to an undesirable extent, but it also demands that the exercise of the right of amendment shall not deprive any party of any defense—the statute of limitations or any other—which he ought to have preserved to him in the order permitting amendment.<sup>4</sup>

What has been said about the spirit of the code on the question of amendments asked has its bearing on the question of the effect of a pleading which does not pray for that relief which turns out, for one reason or another, to be the appropriate relief. Even if the party does not ask leave to amend his prayer so as to ask

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4. The question whether a plaintiff who has attempted to state a cause of action and failed, and who gets permission to amend and then for the first time states his cause of action, ought to have the statute of limitations applied to his cause of action as if he had started his action at the time of the filing of the amended complaint is perhaps technically troublesome, but from the point of view of the spirit of the code seems readily soluble. The defense of the statute of limitations is the defense that too old causes are sought to be litigated and that it is sound public policy to let the dead past bury its dead. But a cause which a party starts to litigate before it is too old, and which he states sufficiently for the opposite party to recognize though not sufficiently to meet the code requirement about a plain and concise statement of the facts constituting the cause of action, is not one that comes fairly within the statute of limitations even though the first amended complaint stating the cause properly is filed after the statute would have run if that amended complaint filing had been the starting of the action.



for that relief, the amendment question is there because the question is really whether the court ought not to deem the prayer amended to ask for that relief. It would have conduced to a sound determination of the vexed question of defective prayers to pleadings under the code if the question had been treated as a phase of the amendment question; for then the court could easily have adopted the sensible rule that the prayer must actually be amended on such terms as should be just whenever the opposite party was misled in the preparation of his case, and should be deemed amended when the opposite party was not thus misled. We should not then have had the courts going astray on the theory of the case doctrine, i. e., the view that if the plaintiff frames his complaint on the theory that his cause of action is in contract when it is in tort, or vice versa, or that it is legal relief that he is entitled to when in fact it is equitable, or vice versa, then he must win or lose on that theory alone. The theory of the case courts would have seen, as at last they are coming to do, that the plaintiff's theory of his case is of importance merely in so far as he has made the defendant believe that only those matters which go to establish the cause which plaintiff thinks he has will be gone into at the trial, and in consequence has induced the defendant to come to trial without all the evidence which he would be entitled to put in under the theory of plaintiff's cause of action which plaintiff finally relies on in abandonment of plaintiff's first theory, or in so far as the plaintiff's original theory of the case has precluded the defendant from claiming that trial to the court alone or that jury trial to which, on the new theory on which at last plaintiff seeks relief, the defendant is entitled. In other words, it is actual and justifiable surprise on the part of the defendant as to the evidence needed or as to jury trial being demandable—or something else in the nature of estoppel—and not any conclusive election on the part of plaintiff, at the start, of a particular theory of his case to the exclusion of other theories, which should be the only impediment to the granting by the court of the very relief and the full relief to which the plaintiff would be entitled if he had adopted at the start the right theory of his case and had prayed for the relief which the court ascertains that he would be entitled to if he had prayed for it. When a plaintiff has set forth in his complaint facts which on some theory of his case entitle him to some relief, legal or equitable or both, and furnishes or, if allowed, will furnish evidence to substantiate the allegations of his complaint, his action should not fail because he

has mistakenly supposed himself entitled to, and has prayed for, relief which he cannot have and has failed to pray for the relief to which he is entitled; for even though the defendant is surprised, that surprise only entitles him to force an amendment and a continuance, or a continuance alone, or to have an order made for the case to be tried with or without a jury as the new theory and the defendant's election make necessary.

Indeed, for that matter, it ought to be held that even if plaintiff attaches no prayer to his complaint the court will give him, at least as against a defendant who does not default but appears and litigates, the relief to which plaintiff shows himself to be entitled, and as to the awarding of which the defendant's only surprise is that the court or jury finds the issues of fact in favor of the plaintiff.<sup>5</sup> There are few code pleaders so careless as to draw a complaint without any prayer in it, but occasionally one such is found. At least one court has allowed a plaintiff appropriate relief although his complaint contained no prayer and an application to amend by inserting a prayer was not made,<sup>6</sup> and the soundness of that conclusion would seem to be evident from a consideration of those cases which say that "a prayer for general relief" is a sufficient prayer. Under the code, a prayer for general relief is made in one of two forms. The plaintiff may state simply that "the plaintiff prays for general relief" or he may state that he prays "for such relief as is just and equitable." Usually the general prayer is tacked on to the specific prayer and is "for such other and further relief as is just and equitable." Now what does such a prayer amount to? It is simply a statement that plaintiff prays for that to which the court thinks him entitled. But surely the common sense way of regarding any complaint—this letter to the judge outlining grievances that we call a complaint—is that it is a request for any relief to which the court shall find the plaintiff to be justly entitled. The very filing of the complaint is the making of a general prayer and if such a prayer is not expressly inserted in the complaint, the court should read one into it and should proceed in the same way that it would if a general prayer were there. If a general prayer will justify, as in some jurisdictions it is deemed to do, the awarding of any appropriate relief which the plaintiff has not expressly prayed for, the mere filing of the complaint without any express

5. Some codes provide that if the defendant does not answer the court can grant on default no relief in excess of the relief demanded in plaintiff's complaint.

6. *Sannoner v. Jacobson & Co.*, 47 Ark. 31, 14 S. W. 458.

prayer should be held to justify the same action. By that it is not meant that a lawyer should draw his complaints without prayers both specific and general, for he should not. Full specific prayers will make it clear that the court was asked to grant the specific relief the granting or the denial of which is relied on as error—it is of course not error for a court to fail to give specific relief not prayed for where there is nothing to show that the court was asked to grant it—will entitle the plaintiff to the proper relief if defendant defaults, and besides will obviate any claim on the part of the defendant who does not default that he was not fully apprised of the matters to be tried. But it is meant that the effect of the absence of a prayer or of an insufficient prayer should not be made more severe than common sense will approve.

But the subject of prayers in complaints cannot be dismissed without a consideration of a question of statutory construction. By section 81 of the New York code, for instance, it is provided that

"The complaint must contain:

"1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the Supreme Court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

"2. A plain and concise statement of the facts, constituting such cause of action, without unnecessary repetition.

"3. A demand of the judgment to which the plaintiff supposes himself entitled."

What is the effect of the words "must contain" so far as the demand for judgment is concerned? Does the court have to treat the insertion of a demand for judgment as a mandatory code requirement or may "must" be construed to mean "may" or "should" so as to make the provision directory? The word "must" in various statutes has on occasion been deemed to mean "may" or "should" and it should be deemed to mean that here. In the first place to give "must" its full inherent meaning would be to make everything in that provision jurisdictional, but there is probably no court in a code state that would be willing to say today that a complaint which misstates the name of the court, or the name of the county to serve as the place of trial, or the name of some party, is so defective that the court has no jurisdiction and hence cannot permit the misstatement to be cured by amendment.<sup>7</sup> The same thing

7. *Jordan v. Brown*, 71 Ia. 421, 32 N. W. 450, which held that the entitling of the cause in the wrong court was a jurisdictional defect making the decree of foreclosure in the suit void is clearly absurd, and would doubtless not be followed even in Iowa today. *Rosewater v. Horton*, 4 Neb. Unoff. 205, 93 N. W. 681.

is true as to the statement of the facts constituting a cause of action. The original statement may not disclose a cause of action, but the court nevertheless acquires jurisdiction and the plaintiff, by amendment, can cure the defect. At the most, then, the words "must contain" mean necessarily only that these things must be in the complaint before the court can be in error in refusing to enter a judgment on it. They do not go to the effect of a judgment entered in the absence of these things, or of some of them, in the complaint, and, accordingly, the effect of such a judgment must be determined on other grounds. If, for instance the requirement that the plaintiff shall state the facts constituting his cause of action in his complaint is so important that the absence of such a statement leaves the judgment rendered in his favor on his defective statement subject to attack at any time, that is not because of the code provision quoted above; for no court has held or would be willing to hold that a judgment rendered on a complaint containing a full statement of the facts was void because of the fact that the statement of facts was not plain and concise and without unnecessary repetition, and yet these things "must" be true of a complaint for the complaint to comply with this code provision. Under the code provision quoted above, and on which those who insist on the necessity of a specific and comprehensive prayer rely, the court is free to give that effect to the absence of a prayer, or to one defectively worded, which justice demands, and justice demands that where the defendant is not reasonably and actually misled by the wording of plaintiff's complaint, including the prayer, the usual code provision shall apply that the court may grant any relief consistent with the case made by the complaint and embraced within the issue<sup>8</sup> and that the court shall be bound by the duty occasionally enjoined by statute, "to disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party."<sup>9</sup>

The question of the need of a prayer may be answered adversely to the need and yet the action of a trial court in compelling the insertion of a prayer or the amendment of a defective prayer be often regarded as correct. A trial court may well insist that lawyers shall conform to good practice, or even the best practice, so long as that insistence does not come so late that it is an abuse of discretion to penalize the plaintiff at that stage of the case. When the complaint contains no prayer or an inadequate one, and the

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8. *Bliss*, "Code Pleading," § 160.

9. *Sannoner v. Jacobson & Co.*, 47 Ark. 31, 14 S. W. 458.

defendant is a genuine seeker after light as to the case he has to meet, the court, if seasonably applied to, may properly require the plaintiff to furnish a sufficient prayer,<sup>10</sup> but at or after a trial of issues which the defendant came to litigate it is too late for the court to insist properly on some amendments, instantaneous or otherwise, which at an earlier stage of the case, when defendant could properly claim the right to be protected from possible surprise, it might have required.

While prayers should be deemed amended when that is just, it must be noted that in a few jurisdictions the courts after verdict will not only not let the verdict stand without remittitur if it exceeds the amount prayed for, but will also refuse to permit the complaint to be amended to pray for the excess amount awarded in the verdict without the granting of a new trial, even though on the application for the post-verdict amendment it appears that the amount for which the verdict was rendered was not excessive on the evidence and that the defendant was not surprised at anything except that he lost.<sup>11</sup> It is only fair to add however, that in New York, at least, later cases are more in accord with the spirit of the code in that they allow the amendment without a new trial if the defendant does not convince the court that the lack of a prayer for the amount sought to be inserted by amendment misled him in his preparation for trial.<sup>12</sup>

But it is not only on the question of amendments and on the question of the effect of an inadequate prayer for relief that the spirit of the code has been violated by code state courts. There is every reason to quarrel with many of the decisions as to when a complaint contains or does not contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition.

The first quarrel must be with those courts that insist with great particularity on allegations which the judges and the defendant know are *meant* to be made, and are omitted only through

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10. Whether the defendant may move to have the complaint made more definite and certain by the inclusion of a prayer may be a matter of doubt (see *The J. F. J. Sieberling Co. v. Dujardin*, 38 Ia. 403, where the code provision was so worded that the court deemed that such a motion would lie only where allegations of fact were too general or indefinite or uncertain), but a motion to strike the complaint from the files for lack of the demand of judgment required by the code would certainly seem to be proper practice.

11. *Pharis v. Gee*, 31 Hun. 443; *First National Bank of Custer City v. Calkins*, 16 So. Dak. 445, 93 N. W. 646.

12. *Frankfurter v. Home Ins. Co.*, 26 N. Y. Supp. 81; *Arrigo v. Catalano*, 27 N. Y. Supp. 995.

ignorance or carelessness. Perhaps as clear an instance as any of such an omission is the failure of a plaintiff who sues for breach of contract to allege the only kind of a breach possible. In a Texas case, for instance, plaintiff sued for specific performance of a bond for title to two hundred and twenty acres of land to be selected out of a larger piece, alleging that defendant owned only two hundred and twenty-five acres in all, and that plaintiff was entitled to a decree divesting the defendant of all title in two hundred and twenty of the two hundred and twenty-five acres, but failed to allege a breach of the condition of the bond. Because of that failure a demurrer to the complaint was sustained.<sup>13</sup> No doubt the first impression of every code state lawyer and judge would be in favor of that decision, but, after all, is it sound? What was lacking from that letter to the judge that any judge or any defendant who was not a stickler for mere form could require? To be sure, the breach of a contract or of the conditions of a bond must actually or inferentially be alleged for the court to be able to see that plaintiff may have a grievance, but should not the court give the plaintiff credit for some intelligence and treat the very presentation of the letter to the judge—the filing of the complaint in the court—as a statement that the conditions of the bond sued on have been broken? Even where there are several possible breaches, why not treat the complaint as inferentially alleging at least one of them and let a defendant who is in doubt as to the breach to be relied on ascertain what that breach is by calling for a bill of particulars or by filing a motion to have the complaint itself made more definite and certain? The good sense back of the code provision that a plaintiff may allege generally the performance of all conditions by himself to be performed would surely be back of a holding that in suing on a sealed or unsealed contract the plaintiff necessarily asserts, even though the assertion is not found in express language in the complaint, that the defendant has failed to live up to his obligations under the bond or contract. In the past the code state courts have laid too much stress on the letter of code pleading provisions and allowed too little play for its spirit.<sup>14</sup>

13. *Holman v. Criswell*, 13 Tex. 38.

14. Take such a case as *Hamilton v. McIndoo*, 81 Minn. 324, 84 N. W. 118. The plaintiff, an administrator, in suing on a judgment due to his intestate alleged that plaintiff was duly appointed administrator *de bonis non* and had qualified as such, but the complaint was held to state insufficient facts because he did not name the original administrator, the reason why he ceased to act, the name of the court appointing plaintiff and the term at which letters were granted.

But the failure of the court to draw sensible inferences from statements in pleadings is not confined to contract cases. In *McElwaine-Richards Co. v. Wall*,<sup>15</sup> the plaintiff alleged that he was employed as a common laborer to work on defendant's building; that plaintiff did not know that a certain plate or chord constituting a part of the building was in an unsafe condition, but the defendant and the superintendent did know that it was; that the superintendent ordered the plaintiff to climb on the plate or chord and throw down some planks or boards; that plaintiff obeyed and the plate or chord without warning turned and fell, throwing plaintiff violently to the ground and injuring him. The trial court overruled a demurrer filed on the ground of insufficient facts alleged, but the Supreme Court reversed a judgment for the plaintiff because in its opinion the demurrer should have been sustained. The court, without the least notion of the absurdity of its position, gravely said:

"From the two facts, as averred, that appellee did not know that the chord was unsafe but the appellant did know it was unsafe, the ultimate or issuable fact that the chord or plate in question was unsafe is left to be inferred. The question with which we have to deal is not one in regard to evidence, but one which relates to pleading. While a court in dealing with evidence may be justified in drawing inferences from certain items of evidence, still it is not warranted in resorting to inferences or deductions where the question involved pertains to the sufficiency of pleading; for the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred and cannot be left to depend upon or be shown by mere recitals or inferences. \* \* \* It is evident that the pleading in question does not respond to the requirements of the rules which we assert, for there is an entire absence of any positive or direct charge to show that the chord of the truss which turned and threw appellee to the ground was unsafe or defective, or that the place to which he was directed to go and engage in throwing down boards was one of danger. The paragraph, at least for the reason stated, was insufficient on demurrer."

These statements were not made in the early days of code pleading, but in the year 1902, and however much they may accord with common law pleading ideas, they are as contrary to the spirit of the code as any statements well could be.

The fact of the matter is that under the code the complaint was not meant to be a ceremonial but, instead, was intended to be only a necessary means to the end of enlightening the court and the opposite party, or parties, as to the grievance or grievances which the plaintiff wants the court to investigate and redress.

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15. 159 Ind. 557, 65 N. E. 753.

Sometimes the code state courts have seen this and sometimes they have not. Take for instance the question whether the common counts as used at common law are properly usable by a plaintiff in a complaint under the code. Mr. Pomeroy argued strenuously that they are not, but most code state decisions are the other way. The fact of the matter would seem to be that ordinarily, although the common count itself does not apprise defendant of the grievance on which the plaintiff is relying, the defendant actually does know and that if he does not actually know the defendant is given all the consideration he is entitled to if he is permitted to call for a bill of particulars or to move to make the complaint more definite or certain in particulars about which he is in doubt.<sup>16</sup> There are, to be sure, cases where a reading of a complaint containing a common count actually gives the defendant no more inkling of the real controversy to be settled than it would give to a stranger; but such cases are very few. In a jurisdiction where a thief who has the stolen property in his possession is regarded as subject to a quasi-contractual obligation in waiver of tort, is a complaint by the owner of the stolen goods against the thief which contains only the common count for goods sold and delivered a complaint which states the facts within the meaning of the code complaint provision? So long as the thief knows what he is being sued for, or can find out readily, why not? The objection in such a case is not to common counts as such, but to common counts in view of circumstances which keep them from really stating, in brief conclusions of fact, the facts constituting the cause of action, but, instead, make them state what are fairly to be regarded as conclusions of law drawn from those facts. But in view of the remedies by way of motions to make more definite and certain and for bills of particulars and in view of the traditional "implied contract" theory of the quasi-contractual relation described under the head of "waiver of tort," that objection seems feeble. To emphasize the fact that the objection of brevity advanced against the common count is not wholly sound, it need only be remembered that the code calls for conciseness of statement; but a California decision—the case of *Christensen v. Cram*<sup>17</sup>—gives the point precision. There the court pointed out that the pleader did not attempt to use the common count but to plead as called for by the code, yet his whole complaint consisted of the statement that he sold a horse and buggy

16. See *New York News Publishing Co. v. National Steamship Co.*, 148 N. Y. 39, 42 N. E. 514

17. 156 Cal. 633, 105 Pac. 950.



to the defendant at a certain price, that defendant paid so much on account, and that the balance had not been paid but was still due, owing and unpaid on account of said sale. No delivery was expressly alleged, but the court said that the word "sold" was used to describe a completely executed transaction. It was clearly a word that stated a conclusion of fact as well as a conclusion of law, and despite the brevity of the complaint, there was enough in the complaint to satisfy the code requirements in the absence of a motion to make the complaint more definite and certain. Had the question arisen before issue and a trial on the merits, the court might have taken a different view, but it is submitted that the same view should be held even before verdict.<sup>18</sup> Clearly, if *Christensen v. Cram* is to be supported, and it would seem that it is, the mere brevity of the common count cannot make it inconsistent with the purposes of the code.

It is, in a sense, true that "the spirit of our civil code is that a party shall state in his pleadings the real facts of his case and not falsehoods or fictions; and when each party states what he believes to be true and the real facts of his case, the court may know precisely where the parties differ,"<sup>19</sup> but the common counts do state facts, or conclusions of facts, even when defendants find the statements obscure, and the spirit of the code would seem to be satisfied with a holding to that effect coupled with a liberal allowance of relief to defendants on motions to make more definite and certain or for bills of particulars. No doubt the spirit of the code would be better served by requiring a bill of particulars at the start, but that is another story.

Closely connected with the common count question just discussed is the question whether a plaintiff who has declared on a contract shall be allowed to recover in *quantum meruit*, no common count being pleaded. The majority view is that, in the absence of amendment, he should not be allowed to do so.<sup>20</sup> The question is really one of variance, that is, of whether the *quantum meruit* matter is sufficiently pleaded, and in a few jurisdictions it is held

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18. But in *Kilpatrick-Koch Dry Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629, where the objection to the allegation was raised first by demurrer, the word "sold" was held not to cover delivery.

19. *Losch v. Pickett*, 36 Kans. 216, 222, 12 Pac. 822.

20. See *Pearson v. Switzer*, 98 Wis. 397, 74 N. W. 214; *Price v. Price's Excr.*, 101 Ky. 28, 39 S. W. 429; *Huston v. Tyler*, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795; *Clark v. Davies*, 88 Neb. 67, 129 N. W. 165; *Formhols v. Taylor*, 13 Ia. 500; *Hunt v. Tuttle*, 125 Ia. 676, 101 N. W. 509; *Jones v. Buch*, 147 Ia. 494, 126 N. W. 452.

that it is sufficiently pleaded unless the defendant was misled.<sup>21</sup> Since a complaint on a contract which alleges the contract price for services will justify a recovery on *quantum meruit* if just before trial it is amended by the insertion after the allegation of the contract price of the words "and which is the reasonable value thereof,"<sup>22</sup> why should not the court regard such an allegation as implied in every complaint for recovery of the contract price? The cases where the common count is used and no contract price is stated, and yet recovery on the contract is allowed on the theory that the contract price fixes the reasonable value of the work done or property furnished,<sup>23</sup> suggest the desirability of some such implication; for if the contract price is admissible as evidence of reasonableness of value alleged, why should not reasonableness of value be admissible as evidence of contract price alleged? Any reasonable implication that will permit the evidence should be made provided only the defendant has not been misled in his preparation for trial.

There must, to be sure, be some limit to the inferences of fact which even code state courts may make in connection with pleadings and to the extent to which they will permit vagueness of statements of facts or of conclusions of fact to stand as against a demurrer on the ground of want of facts sufficient to constitute a cause of action. But the code state courts have erred and still are erring on the side of the defendant. The fact is that the objection of want of sufficient allegations of fact is generally not a meritorious one when urged on demurrer or on objection to the taking of testimony, and that the code state courts have unduly exalted demurrers into unreasonable delayers of justice. What is needed is for the courts to reverse their attitude as to demurrers, objections to the taking of testimony for want of facts, etc., and to

21. *Sussdorf v. Schmidt*, 55 N. Y. 319; *Witkowski v. Harris*, 64 Fed. 712; *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025. In *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290, the court said that the allegation of an agreed price for goods sold "cuts no figure in the case except to prevent a recovery [of the reasonable value of the goods] for any greater sum than the price alleged."

22. *Foulger v. McGrath*, 34 Utah 86, 95 Pac. 1004.

23. *Jenney Electric Co. v. Branhams*, 145 Ind. 314, 41 N. E. 448; *Hecla G. M. Co. v. Gisborn*, 21 Utah 68, 59 Pac. 518; *Vanderbeek v. Francis*, 75 Conn. 467, 53 Atl. 1015. See *Roberts v. Leak*, 108 Ga. 806, 33 S. E. 995.

In *West v. Eley*, 39 Ore. 461, 65 Pac. 798, the complaint was ambiguous, it being uncertain whether the plaintiff was pleading a common count or alleging a contract, but the court said that even if it was a complaint on a *quantum meruit* recovery could be had on the contract. But *contra*, see *Roche v. Baldwin*, 135 Cal. 522, 65 Pac. 459, 67 Pac. 903; *Duncan v. Gray*, 108 Ia. 599, 79 N. W. 362.

give to pleadings not objected to by apt motions in apt time the liberal construction to which they are entitled. The chief thing which the defendant is entitled to is protection against surprise and so long as he has that protection, his pleading objections should be minimized. The sound attitude toward the plaintiff's complaint has been stated by the Wisconsin court, in abandoning the old theory of the case doctrine, namely:

"For sufficiency of facts pleaded the code looks to the substance, not to form. Its basic principle is that the administration of justice should not be embarrassed by technicalities, strict rules of construction, and useless forms. In harmony with that the proceedings mapped out for litigants to follow were by the architects of the code made as simple and plain as practicable. Then they provided that every pleading shall be construed as sufficiently stating everything necessary to the cause of action or defense intended, which can be found alleged therein, expressly or inferentially, looking at the language thereof in its full reasonable scope, and it was further provided that all errors in proceedings, not prejudicial, shall be regarded as immaterial. This rule was deduced in *Kliefoth v. Northwestern I. Co.*<sup>24</sup> from previous decisions on the subject:

"In determining whether a complaint states a cause of action, the question is not whether the plaintiff used the most appropriate language in stating his case, but whether the language used will permit a construction which will sustain the pleading, and to that end such effect should be given to its allegations as will support rather than defeat it, if that can be done without adding by way of construction material words not necessarily implied, or giving to the language a meaning that cannot be reasonably attributed to it."<sup>25</sup>

If that had been the guiding principle of code state courts from the start, how very different would code pleading have been and how easily would the courts have narrowed the scope of the demurrer for want of facts, etc. Perhaps much of that narrowing may yet be done.

But before we leave the subject of complaints and objections to them, a special word is necessary about the very troublesome joinder of causes of action section.

The joinder of causes of action matter has often been misconceived. The framers of the code were reasonably specific as to many matters of joinder of causes of action, but they wanted to permit such joinder as rationally ought to exist, so provided for joinder of causes which arise out of the same transaction or transactions connected with the same subject of action, provided they all affect the same parties, are consistent with each other, etc. The

24. 98 Wis. 495, 74 N. W. 356.

25. Marshall, J., in *Manning v. School District*, 124 Wis. 84, 91, 102 N. W. 356.

words and phrases—"transaction," "subject of action," and "causes of action"—should be interpreted with that legislative purpose in mind. A few situations should be considered from that point of view.

A man and his buggy are hit by a train, owing to the railroad company's negligence, and both are injured. In many jurisdictions there arise two rights of action, one for the personal injuries and one for the injury to the buggy. There is one cause for these two actions, namely, the one negligent act of the railroad company, but we say that in the jurisdictions mentioned there are "two causes of action." That there is, however only one transaction seems clear, but the cases leave the matter in doubt.<sup>26</sup>

Now suppose that I am, without probable cause arrested and imprisoned, and that at the time of the arrest and in the presence of other persons, I am untruly called a thief. Here again there are "two causes of action," but there are two different acts of the defendant. Are there therefore, two transactions? The common sense answer is that the false imprisonment and the slander constitute one transaction, but the courts divide on the point.<sup>27</sup>

In a Connecticut case, Judge Baldwin defined "transaction" as follows: "A transaction is something that has been transacted, that is, acted out to the end. \* \* \* As the word is employed in the American codes of pleading and in our own Practice Act, a transaction is something which has taken place whereby a cause of action has arisen,"<sup>28</sup> or several causes of action have arisen. The question is whether two causes of action which do not grow out of one act can be said to be other than the result of separate happenings, for every separate happening which gives rise to a right of action would seem to constitute a separate transaction. The answer would seem to be that identity of parties and substantial identity of time and place make the false imprisonment and the slander "one transaction" properly written up by a newspaper reporter as one story and properly included by plaintiff in the one complaint, even though in general slander and false imprisonment causes of action may not so be joined. But if we should

26. In *McInerney v. Main*, 81 N. Y. Supp. 539, the causes of action were held to arise out of one transaction. But cf. *DeWolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455.

27. See *Harris v. Avery*, 5 Kans. 146, that they constitute one transaction and *DeWolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455, that they do not.

28. *Craft Refrigerating Mach. Co. v. Quinpiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76, 77. The first quoted sentence appears in the Atlantic Reporter, but is missing from the official report.

conclude that they do not constitute one transaction, we should probably have to say that they are not causes of action connected with the same "subject of action" within the meaning of the code framers. No doubt a man's body is different from his reputation, but the question is whether, when a man's opponent deals him at one time and place two unwarranted injuries, one to his body and the other to his reputation, it is in accord with the spirit of the code to say that the causes of action are connected with diverse subjects of action. The answer is that the code has said that in general the two causes may not be joined, so in general a man's person and his reputation must be deemed diverse subjects of action, and while it is not in accord with the spirit of the code to affirm that they must always be so, it is probably in accordance with that spirit to say so as to the joinder of causes of action. It is true that at any given moment a man is legally one bundle of rights as to person, to reputation, etc., and that injuries to those rights committed by the same defendant or defendants, and all committed at one or substantially one time and place, are connected with that one bundle as the subjects of action, but that does not conclude the matter. While unity of time, place and person may constitute one transaction, and may make the person's rights, regarded as a united part of his legal personality, one subject of action from a common sense or even a philosophical point of view, the question is what the legislators who passed the code meant by the code phrases and the other joinder of causes of action code subdivision have to be consulted to determine that. Where the suit is not for property but for the vindication of primary personal rights, the courts have treated each right as a separate subject of action, not because a right is really separate from the legal personality to which it belongs, for it is essentially a part of that personality, but because the mere fact that one person owns the various rights violated cannot be deemed to make one subject of action without nullifying all but the transaction and subject of action subdivision of the joinder of actions provisions of the code. Unless, therefore, the false-imprisonment-slander case is an instance of one transaction—which it would seem actually to be—the joinder of the two causes of action would seem to be improper for the reason that while logically the causes relate to one subject of action, to-wit, the one man injured in the two ways at the one time and place, the code provisions construed impliedly negatives any such broad meaning of "subject of action" as intended.

Almost the farthest that any court has yet gone is to treat the

phrase, "subject of action," as broad enough to cover property rights (including possessory rights) and the property to which the rights attach or relate as together constituting one "subject of action." The situation adjudicated, namely the joinder of a statutory cause of action to quiet title to land with a cause of action for trespass to the same land caused the court, in upholding the joinder, to lay down the rule "that in possessory and proprietary actions, whether involving real or personal property, the subject of action is composed of the plaintiff's primary right, together with the specific property itself."<sup>29</sup> The actual decision in *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*<sup>30</sup> goes a step farther if the decision be rested on the "subject of action" clause and not the "one transaction" clause which latter the court mainly argued for. In that case the complaint contained two causes of action, namely, (1) for breach of contract of sale of refrigerating machines whereby title to the machines passed to the defendant; and (2) conversion of the machines by keeping them by force after notifying plaintiff that they were not according to contract and getting plaintiff to agree to take them back. The court said that the two causes of action arose out of one transaction, but it seems fair to say that there were two transactions since the conversion was in no sense in breach of the contract. To meet that argument the court said that if there were two transactions they were both connected with the same subject of action, "i. e., the two machines and the title to them." That goes a step further than the Wisconsin case because here the contract cause of action is not possessory or proprietary, though the tort cause of action is possessory. The rule of the Connecticut court puts with possessory or proprietary causes, causes of action for breach of contract of sale of the specific property affected by the possessory or proprietary actions. The spirit of the code would seem to justify that much extension of the Wisconsin rule, for the other subdivisions of the joinder of causes of action section are

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29. *McArthur v. Moffett*, 143 Wis. 564, 568, 128 N. W. 445. In that case the joinder of a statutory cause of action to quiet title to land and a cause of action to recover damages for trespass to the cutting of timber on the land was upheld. The court said that "in controversies involving conflicting claims to specific real or personal property, the property itself plus the right, title, interest, claim or lien upon that property which the plaintiff alleges and which gives him his standing in court is to be considered as together forming the subject of the action, and he may join to his first cause of action another based on a different transaction from the first, but which is connected with reasonable directness with either the property itself or with the plaintiff's title or interest therein alleged in the first cause of action": (143 Wis. at p. 568).

30. 63 Conn. 551, 29 Atl. 76.

too restrictive and the "transaction" and the "subject of action" subdivision must accordingly be given as wide a range as is possible and yet practicable.

But, after all, complaints are not the only code pleadings of fact, and a word must be said about answers. An answer is the defendant's letter to the judge and to the opposite party, which apprises both of them of his defense or defenses, and if the spirit of the code is to control and matters of form prescribed by the code have been observed, the plaintiff is only entitled to protection against surprise and to have the benefit of any admissions fairly to be deemed contained in the answer.

It is on the subject of admissions and the proper preparation for trial that the propriety of inconsistent defenses calls for discussion. That the defendant may be compelled to elect between such defenses so as to apprise plaintiff of what defense to prepare to meet and that, if plaintiff does not require election, the plaintiff may fairly rely upon the strongest admissions contained in defendant's answer would seem to be the conclusion demanded by the spirit of the code. That would seem to be so whether the answer is verified or not. With that exception, the spirit of the code would seem to be against depriving the defendant of any defense which he may have so long as the issue is not beclouded and the plaintiff is not misled.<sup>31</sup>

With reference to counter claims, the same question arises as with regard to joinder of causes of action in complaints. Great liberality in the construction of the words "causes of action," "transaction" and "subject of action" should be indulged to the end that all controversies which fairly ought to be litigated and settled in the one suit may be so litigated and settled.

But enough has been said about particular pleadings to give point to what has been said about the spirit of the code. Good things as well as bad things must be said of the code and of code courts.

Indeed, if one thing is made clear by a consideration of the code provisions about pleadings, it is that very little change is needed in them if only they are construed in their proper spirit. What is needed is not a new code but a reformed attitude of judges and practicing lawyers toward the codes that we have. Not only

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31. See the liberal decision holding that, by failing to demur, the plaintiff waived a defect in an answer which pleaded an accord and satisfaction so insufficiently that a demurrer to it might well have been sustained had one been interposed. *Oil Well Supply Co. v. Wolfe*, 127 Mo. 616, 30 S. W. 145.

so, but unless judges and lawyers get that reformed attitude, the enactment of a new code will do no special good, for after it shall have been in operation some years we shall have to say of its treatment what Winslow, C. J., said of the adjudications of the New York courts in applying the code:

"The cold, not to say inhuman, treatment which the infant code received from the New York judges is matter of history. They had been bred under the common law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the code rules and constructions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators."<sup>32</sup>

Perhaps after all, we do not need new legislation. On that point, it is well to remind ourselves that the courts were probably in error in recognizing the right of the legislature to dictate court procedure. In some of our states the courts have denied the right of the legislature to regulate admissions to the bar, and by the same token the right of the legislature to regulate procedure in court might well have been denied. However that may be, there can be little doubt that the courts, by construing the existing statutes liberally—especially by construing as directory much which in the past has been regarded as mandatory—and by adopting sensible and simple rules of court about pleading and practice, can do about as they please in making simple and flexible that in code procedure which ought to be. Code state courts are too apt to be like the baseball pitcher who has gotten into the state of mind where he "pitches in a groove," i. e., despite his will to throw balls in various places, he sends in balls as if there really was one groove in the atmosphere out of which he could not make the ball move. Such a pitcher needs only rest or some wholesome handling to restore his usual range of throws. So it may be with the courts. Perhaps the widespread demand for reform in procedure may be the electrifying shock that will give them back their proper control and effectiveness.

The only advantage that could accrue from a revised code, so far as pleadings proper and their contents are concerned, would lie in the fact that the new wording would enable the courts to brush to one side many decisions that are embarrassing the courts in their efforts to apply existing code provisions according to their real spirit and intent. We must not exaggerate the ease and extent of

32. Winslow, C. J., in *McArthur v. Moffett*, 143 Wis. 564, 567, 128 N. W. 445, 446.



that brushing aside even with a changed wording, for many lawyers will urge the applicability of many of the old decisions under the present codes to the new provisions and many judges will doubtless be influenced by such lawyers and such decisions. But, on the other hand, we must not overestimate the difficulties in the way of a reformed attitude toward the present code provisions, for one has but to see what the Wisconsin courts are doing, now that they have begun to look at the code with correct vision, to realize that the spirit of the code may come to its own without new legislation.

And now for the one last word of warning. The subject of this paper is the spirit of code pleading. It has, after all, a very narrow scope. For the problems of pleading are really not our most troublesome problems in reforming procedure. At the bar association conference held in Illinois several years ago on the subject of reform in procedure, it was the assertion of some of the code state delegates that in the code states the delays in the administration of justice come after the issues are made up and not before. The delays and the expense are experienced after the pleading stage is passed and the real trouble, then, is not with code pleading, but with the code procedure that does not relate to pleading proper. This is not wholly so, of course, but it is very largely so. The lesson to be drawn is that we must not expect too much from reformed code pleading or from a reformed court attitude toward code pleading. But even in the field of code pleading proper, there is something substantial to be gained, and therefore something that will be gained when the spirit of the code comes into its own.

# SOME OBSERVATIONS ON THE ILLINOIS DECISIONS AFFECTING PROPRIETARY RIGHTS IN ILLINOIS LANDS UNDERLYING LAKES AND STREAMS

BY ISAAC N. HARDIN AND ELMER M. LIESSMANN

## THE AUTHORITIES ARE IN CONFUSION.

No question has arisen in Illinois calling for judicial determination of a subject which has been so little understood or so much misunderstood, and of which so many contrary conceptions of law and of adjudication have prevailed, as in questions involving the proprietary rights in lands underlying lakes and streams. This observation is made after careful study of, and in the light of many well considered decisions of the highest courts in this country both federal and state, as well as the English cases, and the anomalous rulings of the Supreme Court of Illinois, with particular reference to the recent case in Illinois of *Kinsella v. Stephenson*.<sup>1</sup>

## SOURCE OF TITLE TO SUB-AQUEOUS LANDS.

*The Power of Individual States Generally, over Lands in their Jurisdiction.* The colonial states by virtue of grants from the Crown of England, had the title to the public lands in their jurisdiction at the time of the formation of the union. That title was not taken from them when the federal government came into existence and, except to the extent that they have themselves divested themselves of the title, it still remains in those states respectively.

Having proprietary title to lands within colonial limits, it was competent for the colonists to enact laws to govern and control them, and to establish the extent to which title would vest in the purchasers of colonial grants bordering on waters. Thus, an enactment passed by the early Massachusetts colonists fixed such boundaries, changing the common law in that respect, retaining in the colony title to the beds of water beyond certain prescribed limits.<sup>2</sup> Grants, however, made by the colony to individuals before the adoption of the change were unaffected thereby; such grants

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1. 265 Ill. 369 (1914).

2. "Body of Liberties," passed by Massachusetts Colonists (1641), cited in *Paine v. Wood*, 108 Mass. 106; *Com. v. Vincent*, 108 Mass. 441.

carrying title to the beds of waters, according to the principle of the common law.<sup>3</sup> The distinction should be well observed that exists between lands held and conveyed to individuals by the commonwealth of Massachusetts, and other colonial states, and lands held and conveyed by the United States. It was clearly within the power of the colonial states to legislate, or for their courts, correctly or erroneously, to decide, to what extent grants to abutting shore owners upon waters of any kind, whether sea, rivers, lakes or ponds, carried title, because all lands and waters belonged to such states or proprietors. If the courts of the other New England states, outside of the Massachusetts jurisdiction, chose by their decisions erroneously to follow the limitation imposed in Massachusetts, by the Ordinance of 1641, upon that colony, it was not for others to question. Such act and decisions, however, would not establish a rule to govern grants of land held and conveyed by the United States. Limitation of the common law rule affecting lands of the United States can be made only by authority of Congress, and this must be done before grants are issued by the government. Certainly no state legislation, and no decision of a state court, can limit the operation of a grant of United States' land by the United States. It is to Congress alone that power is given to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.<sup>4</sup> Whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States.<sup>5</sup>

In respect to lands situated within the limits of the Northwest Territory, out of which Ohio, Indiana, Illinois, Wisconsin, and Michigan were created, the conditions are different from those existing in Massachusetts and the other colonial states, for while the latter had title to and were possessed as proprietors of all land within their borders, Illinois and the other states comprising the Northwest Territory, had no lands whatever, as proprietors, when admitted into the federal union. Title and proprietorship of lands

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3. *Inhabitants of Roxbury v. Stoddard*, 7 Allen 158 (Mass.)

4. Constitution of the U. S., Art. 4, Sec. 3; *Jourdan v. Barrett*, 4 How. 168 (U. S.).

5. *Paige v. Peters*, 70 Wis. 178; *Wilcox v. Jackson*, 13 Peters 498; *Bagnell v. Broderick*, 13 Peters 436; *Wilcox v. Cornell*, 13 Peters 516; *U. S. v. Gratiot*, 14 Peters, 526.

comprising the Northwest Territory were vested in the United States by cession from Virginia subject to the terms and conditions of the cession, and purchasers of land from the United States, like purchasers of land from Massachusetts, took title subject to the conditions under which their lands were respectively held. Questions involving title of each of their respective lands are determinable by Massachusetts in the one case and by the United States in the other.

THE LAW GOVERNING GRANTS OF ILLINOIS LAND BY  
THE UNITED STATES.

The inquiry as to the law governing original grants of land in Illinois, therefore, leads to the question, what were the conditions under which the cession was made by Virginia to the United States? For these conditions must then affect grants to individuals, of the lands thus ceded.

Historically, it will be recalled, Virginia during the time of the Revolution had fitted out an expedition, at its own expense, under General George Rogers Clark, and captured from the British all the outlying territory west of the Colonial possessions, extending to the Mississippi River. This vast area was held by and brought under the jurisdiction and administration of Virginia, until ceded by that state to the United States March 1, 1784, when it became a territory of the United States, brought under its jurisdiction and laws, known as the Northwest Territory. In accordance with the compact entered into between Virginia and the United States provision was made for the government of the territory leading to the adoption of the great Ordinance of July 13, 1787, a document second only in importance to the Declaration of Independence, providing for the separation of the territory into states, when qualified, and for a system of laws that should be the basis for judicial procedure in the states when formed. It was provided that the inhabitants of the territory should always be entitled to the benefit of judicial proceedings according to the course of the common law, such being compulsory upon the states when formed.<sup>6</sup>

In accordance with the requirement, the first enactment of the legislature of Illinois after it became a state was approved February 4, 1819, entitled "An act declaring what laws are in force in this state," providing

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6. "Great Ordinance," July 13, 1787, providing laws governing the Northwest Territory; Act of the Illinois Legislature Feb. 4, 1819.

"That the common law of England, all statutes or acts of the British Parliament made in aid of the common law prior to the fourth year of the reign of King James the First . . . shall be the rule of decision, and shall be considered as of full force, until repealed by legislative authority."

It will not be questioned that the rule of the common law prevailed in Virginia, and also its acquired possessions northwest of the river Ohio. Without restriction except by the terms of the cession, such title as Virginia possessed passed to the United States by the cession, leaving the latter free to adopt such laws as were advisable for the exercise of its ownership. But under the compact entered into between Virginia and the United States, leading to the cession, and to the ordinance passed by Congress accepting the cession, and providing for laws for its government, there were conditions restrictive in character of portions of the rule of the common law, yet stipulating that, with such exceptions, the rule of such law should apply and govern in the states to be formed out of the territory.

Among the restrictions of common law right imposed and provided for in the compact between Virginia and the United States was one of exceeding importance, affecting and changing abutting shore owners' rights upon waters which are navigable in fact, and which under common law rules were subject to private ownership. It was therein provided that the navigable waters leading into the Mississippi and the St. Lawrence rivers should be and remain public highways.<sup>7</sup> By this act grants of the public lands thereafter to be made by the United States bordering navigable water were limited so as to *convey title only to the edge of the water*. The act, in effect, was a dedication of such waters and beds to the several states when formed out of the Northwest Territory, in trust for navigation purposes, vesting them with title thereto as trustee for the public, the same as tide waters are so vested, under the rules of the common law. The act<sup>8</sup> is dedicatory in nature. By it the navigable waters of the territory were given the character of public waters, as distinguished from waters (although navigable) held by shore-owners as proprietors, under the common law, and it is under *this act alone* that the state is entitled to claim as trustee for the public the navigable waters and their beds, such as the great lakes and rivers of the state. For no claim of ownership or trusteeship by the state can be maintained or exercised unless authority and

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7. Ordinance, 1787, declaring navigable waters public highways.

8. *Ib.*

title have been conferred upon the state by some act of Congress, by which such waters and their beds were transferred to the state by the United States, confessedly holding primary title thereto. Illinois came into the federal union barehanded with respect to title and proprietorship of land of any character, and is in no position to claim lands of any kind whatever, submerged to any extent, or unsubmerged, without first showing that such lands were granted to it by the United States.

*Common Law Rule.* The common law, then, being the rule governing original grants of sub-aqueous land in the State of Illinois, it becomes important to know what that common law is.

The early framers of the compact between Virginia and the United States, recognized evidently that the great navigable waters of the territory (such as the Great Lakes, the great rivers, the Mississippi, the Missouri, the Ohio, and the Illinois; the greatest and most important system of waterways in the whole world) should not be given over to that individual proprietorship, subject only to an easement in the public for the purposes of navigation, which exists under the common law, but that such waters should be brought within the rules applying to tide waters, wherein the state might exercise its natural governmental prerogatives, as in the case of such waters. Hence the provision was incorporated into the compact and Ordinance of 1787 carrying it into effect, that the navigable waters of the territory should be regarded the same as are tide waters, and that the title thereto be dedicated to the public as "common highways." This act accomplished an important departure from the rule of the common law, a departure recognized as such by the Supreme Court of the United States in a case arising on the Mississippi River in Minnesota, wherein it was stated by that court, that in view of the legislation by Congress it did not

"Hesitate to decide that Congress in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the lands bordering on navigable streams should stop at the stream, and that such streams should be deemed to be and remain public highways."<sup>9</sup>

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9. *Railroad Co. v. Schurmeir*, 7 Wall. 272 (U. S.) In a case arising in California, the Supreme Court of the United States, citing with approval the Schurmeir case, said: "The legislation of Congress for the survey of the public lands recognizes the general rule as to public interest in waters of navigable streams without reference to the existence or absence of the tide in them": (*Packer v. Bird*, 137 U. S. 661). In New Jersey, in a case involving common law principles, the court stated: "By the common law, all

*As to Land Under Navigable Waters.* In that connection, however, it should be observed that the Supreme Court of the United States, at a very early date arrived at the conclusion that all states including such as were formed out of territories, own their navigable waters and the soil under them, subject only to the control of the federal government in the interest of navigation. This, it seems, is a fundamental rule that grows out of the very nature of the Union and is not subject to abrogation even by such an instrument as the compact between the United States and Virginia,<sup>10</sup> and within this rule, "navigable waters" are considered as embracing all bodies of water within the admiralty jurisdiction of the United States.<sup>11</sup> Proceeding from this premise, a recent decision of the United States Supreme Court holds that title to the beds of navigable streams thus owned by the state and the land under inland navigable lakes, pass to private owners "by force of the declaration of the state which does own it that it is attached to the shore."<sup>12</sup> The land under the waters of the great lakes, adjacent to the shore within this rule, would likewise be in the state, but that, it is held, the state holds in trust for the people and it cannot divest itself by granting or otherwise giving it to private owners, "except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the land and waters remaining."<sup>13</sup> It is difficult to reconcile the two rules inasmuch as they proceed from the same premise, unless the fact that the great lakes are more in the nature of the great seas of the world, is reason for the distinction.

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waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter, in the individual proprietor. The title of the sovereign being in trust for the benefit of the public—which includes the right of fishing and navigation, is common. The title of the individual, being personal in him, is exclusive—subject only to servitude to the public for purposes of navigation, if the waters are navigable in fact . . . And all the cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the rivers of the country, are held to be public in any other sense than as being subject to a servitude to the public for purposes of navigation, are confessedly a departure from the common law": (*Cobb v. Davenport*, 32 N. J. L. 369).

10. *Pollard v. Hogan*, 3 Howard 219 (U. S.); *Hardin v. Shedd*, 190 U. S. 508.

11. *Illinois Central Railroad v. Illinois*, 146 U. S. 387-435.

12. *Hardin v. Shedd*, 190 U. S. 508.

13. *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387-435.

*As to Land Under Non-Navigable Waters.* The rule is different with respect to land under waters that are not navigable, from that applied to land under waters navigable.<sup>14</sup> And at this juncture one is confronted with the situation, apparently, that "navigable" in the parlance of the federal law may be different from the same term as understood in the state law. It should be remarked that no waters in the State of Illinois are navigable under the test of the English common law which confines the term to waters affected by the tide. But, there are waters in which Illinois is interested that are navigable in fact both under the definition of the term as understood in federal law and that under the state law. According to the Illinois decisions, to be navigable in fact, a stream must, in its ordinary and natural condition, furnish a common passage, capable of carrying commerce of practical utility to the public, in the customary mode in which such commerce is conducted by water.<sup>15</sup> The federal rule of navigability is concerned with the admiralty jurisdiction of the United States and would apply the term to the public water highways of the country.<sup>16</sup> Whether the terms as thus applied are synonymous or not, it is not attempted here to say, but it is conceivable that the state definition might be more comprehensive than the federal.

As affecting original grants of land by the United States, of lands under non-navigable streams, it is clear that such lands were retained by the United States as part of its private property which did not pass to the state in its sovereign capacity in trust for the people as did lands under navigable waters. The United States retained as its private property at the time Illinois became a state, all public lands.<sup>17</sup> It is true, also, that whenever the question is one as to whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States, though, once the title has passed according to the laws of the United States, that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission that the title

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14. *Packer v. Bird*, 137 U. S. 666 (1890); *Hardin v. Jordan*, 140 U. S. 371; *Hardin v. Shedd*, 190 U. S. 508.

15. 10 Ill. Law Rev. 379.

16. *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387-435.

17. *Pollard, Lessee, v. Hogan*, 3 How. 219 (U. S.)



passed and vested according to the laws of the United States.<sup>18</sup> And that being true, and the law being that the title to the lands under non-navigable waters, remains in the United States, it must follow that the determination of whether a water is navigable or not, must be determined by the laws of the United States.

Given land under non-navigable waters, then (within the proper definition of navigability), the question that must so be resolved by the laws of the United States, is *whether such lands pass with a grant by the United States of lands bordering on such waters*. Thus it would seem, it becomes a question of construction of the federal grant. Upon that question the Supreme Court of the United States laid down this rule: The federal grant by the United States of its private property in the state, passes, with the land actually described by metes and bounds, also, "whatever incidents or rights attach to the ownership of" the property thus conveyed, and, the property of the United States being private property, the question of what incidents or rights attach to it is to be governed by the laws of the state like any other private property.<sup>19</sup> This rule was adopted by the majority opinions in two later cases of that court.<sup>20</sup> It should be noted that in the former of these cases the dissenting opinion questions that land can thus be an incident to land, and if the rule is that such incident must pass by virtue of the state law, the court is squarely confronted with the fact that in Illinois it is the rule of law that land *cannot* be appurtenant to land.<sup>21</sup> And in the *Hardin v. Shedd* case a strong dissenting opinion strikes the same note with the observation that, if as a matter of construction the federal grant extended only to the water's edge, then the bed of the lake remained in the United States.

*In Résumé.* Thus by pronouncement of the Supreme Court of the United States, the federal law provides that in Illinois, lands bordering on Lake Michigan extend only to the water's edge; lands bordering on other navigable waters in the state pass to the middle of the water, or not, or otherwise, accordingly as the law of the state may provide; because the beds of such waters belong to the state, and what the state does with its own is nobody's else concern; and lands on non-navigable waters pass to the middle of the

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18. *Wilcox v. McConnell*, 38 U. S. 517.

19. *Packer v. Bird*, 137 U. S. 666.

20. *Hardin v. Jordan*, 140 U. S. 371; *Hardin v. Shedd*, 190 U. S. 508.

21. *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410.

water or not, or otherwise, depending upon the law of the state; because lands under non-navigable waters are incident to the adjacent lands bordering on the waters and the state law determines what incidents are attached to lands in the state. The inquiry then is as to what the state law is in such cases.

### THE ILLINOIS LAW.

*Streams.* The Illinois cases have consistently held that riparian owners on streams in the state own to the middle of the stream.<sup>22</sup> Thereby, doubtless, it must be concluded so far as navigable streams are involved, the half of the bed passed "by force of the declaration of the state" of Illinois, speaking through its judiciary. Charges that this amounted to an arrogation to itself by the court of the power on behalf of the state to make a conveyance and that such action by the court was a usurpation of the powers of the legislative department of the state is vain protestation in view of the solid array of authority that sustains the action.

The fact remains, so far as the Illinois property rights are concerned, the law as above stated in Illinois, is established. It is established, as well, that this doctrine of Illinois is unique and anomalous. It has been commented upon in jurisdictions outside of the state on numerous occasions. In an early case<sup>23</sup> the Supreme Court of the United States refers to this liberality of the State of Illinois in language as follows:

"That if the states choose to resign to the riparian proprietor rights which properly belong to them, in their sovereign capacity, it is not for others to raise objections."

It is possible that a controlling factor in the decision of the court in *Middleton v. Prichard*,<sup>24</sup> which is responsible for this aberration, is found in the language:

"Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such

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22. *Middleton v. Prichard*, 3 Scam. 510; *Canal Trustees v. Haven*, 11 Ill. 548-556; *Ensminger v. P.*, 47 Ill. 384-388; *City of Chicago v. Laflin*, 49 Ill. 172-175; *City of Chicago v. McGinn*, 51 Ill. 266-272; *Braxton v. Bressler*, 64 Ill. 488-493; *C. & P. R. R. v. Stein*, 75 Ill. 41-45; *Houck v. Yates*, 82 Ill. 179-181; *Cobb v. Lavalle*, 89 Ill. 331-334; *Washington Ice Co. v. Shortall*, 101 Ill. 46-51; *Piper v. Connelly*, 108 Ill. 646-651; *McCartney v. R. R. Co.*, 112 Ill. 614-634.

23. *Barney v. Keokuk*, 94 U. S. 324.

24. 4 Ill. 510.

as platting or surveying, we must construe its grant most favorable for the grantee, and that it intended all that might pass by it."

If that is true, it is submitted the court proceeded upon a false premise. The government had already done the very things of which the court made exception, for it had provided that the navigable waters leading into the Mississippi and St. Lawrence Rivers should be and remain "common highways." The common law right of individual ownership of the beds of waters navigable in fact, such as the Mississippi River, was changed by the reservation of such rights for and dedicating them to the states when formed as public highways. The surrender to individuals by court decisions of rights dedicated to and which properly belong to the state in its governmental capacity, invites sharp and well merited adverse criticism.<sup>25</sup>

Inasmuch as this result proceeds from the application by the Illinois court of the strict rule of navigability which confines navigable streams to those affected by tides and all streams in the state are non-navigable at law whether navigable in fact or not, the Illinois court finds itself in this position: If the rule of navigability to be applied in determining the title to lands under streams in the state is that of the United States,<sup>26</sup> then as to streams which are navigable, in fact, at least, the title is in the State of Illinois, but as to all others the title is in the United States, subject to pass with the lands bordering on such waters as incident thereto, if under the law of Illinois the federal grant should be construed as including them. If, on the other hand, the rule of navigability in force in the state is to obtain, then all streams are non-navigable and the beds pass to the riparian owners only if the federal grant can be thus con-

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25. In an able opinion in *Mississippi*, a distinction is sharply drawn between public and navigable rivers, in which it was contended that the decisions repudiating the common law doctrine on this subject were the result of a misconception of the reasons upon which the common law distinction is founded. It was held that fresh water navigable rivers are called public rivers, not in reference to the property of the river, for that is in the individual who owns the soil; but in reference only to public use having a right of way over fresh water streams; but that the title to the bed is in the riparian owners: (*Magnolia v. Marshall*, 39 Miss. 109.) This case, however, is not an authority to influence decisions in Illinois on the subject of title to navigable rivers, for the reason that Mississippi has no restriction of common law rights placed on grants in that state, as has Illinois, although Illinois has erroneously followed the Mississippi rule, failing to notice the distinction.

26. *Packer v. Bird*, 137 U. S. 666; *Hardin v. Jordan*, 140 U. S. 371.

strued to include them. But the federal grant cannot be so construed, because, as is shown hereafter, so to construe it involves holding land appurtenant to land.

The case of *Kinsella v. Stephenson*<sup>27</sup> marks a variation from this rule that riparian owners on streams in the state own to the middle of the stream. In this case the rule of apportionment applied was borrowed from the case of *Clute v. Fisher*,<sup>28</sup> which was, itself, overruled by a later case in the same jurisdiction<sup>29</sup> in which the court says that the rule that the

"Owner of a fractional subdivision owns the soil which was included within the external subdivision lines, is inconsistent with the rule repeatedly laid down in this state that the shore proprietor owns to the thread or center of the stream."

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27, 265 Ill. 369. In that case a question of title arose between owners of land on opposite sides of the Kankakee River. In the government survey, it appears that the river was meandered, possibly at a time when the river was at high water, and the map showed all of section 23 as being south of the south meander line of the river except a small piece of 7.41 acres which appeared as the northwest corner of the section and was north of the north meander line of the river. Section 14 bounded this 7.41-acre piece up to the point where the north line of this piece extended east to the north meander line of the river, and from that point on to the east line of section 14 the north meander line of the river bounded fractional section 14 on the south. At low water at least, the meander lines did not coincide with the bounds of the river, but on the contrary a large tract of land appeared between the meander lines and the river. Much of this land fell within the north line of section 23 extended. Much of it, also, fell within a description of half the bed of the river as fixed by the north meander line, if section 14 or that part thereof on the meander line were extended to the middle of the river bed as thus fixed by the north meander line. Upon that peculiar state of the facts, the rights of the contending parties revolved; the one party, who owned in section 14, claiming by virtue of his riparian ownership; and the other who owned in section 23, claiming by virtue of the north section line of that section continued east across said north meander line.

The court in its decision, apparently proceeds from a rule (265 Ill. at p. 382) that "where there is a mistake in the survey of a fractional lot so that either the line of a meandered stream or the quarter section line must be abandoned, the quarter section line must be adhered to as the more certain call." Taking this in connection with a rule (265 Ill. at p. 380) that a grantee, by patent, of a legal subdivision, cannot thereby derive title to land upon another legal subdivision, the conclusion follows (p. 383) "that the grantee from the government of the southwest quarter and southeast quarter of section 14 \* \* \* took all the lands contained within the boundary of said quarter section when the same should be established, but they would not thereby take title to any land outside of said quarters, and would not take any title thereby to any lands in section 23."

28. 65 Mich. 48.

29. *Grand Rapid Ice & Coal Co. v. S. Grand Rapids Ice & Coal Co.*, 102 Mich. 227.

The reference in that case to *Fuller v. Shedd*<sup>30</sup> as authority for the statement "that the section lines could not be extended when a lake was so large that the extension of those lines would not absorb it" is erroneous. That is the peculiar rule in Indiana, and the court doubtless had in mind the case of *Stoner v. Rice*<sup>31</sup> when it made that reference.

*Lakes.* Owners on the great lake (Michigan) that touches the domain of the State of Illinois, have received less liberal attention from the court. Such owners are confined in the extent of their ownership to the line at which the water of the lake ordinarily stands when it is in a state of rest. Thus in the pioneer case upon that point<sup>32</sup> the court says:

"These great bodies of water, having no currents, like rivers and other running streams, cannot present the same reasons why the boundary should be extended beyond the water's edge, where it is ordinarily found, that apply to running bodies of water. Where such streams are called for as a boundary, the thread of the current is held to be the line, from each side. Such a rule could not, for the want of a current, be adopted in this case. It would not be sanctioned either by analogy to the rule, or by reason. And if the outer edges of the water be passed, owing to the approximation of these bodies to a circular shape, it would be found exceedingly difficult, if not impossible, to ascertain where the boundary should be fixed, or the shape it should assume."

But the leading case upon the question, possibly is *People v. Kirk*,<sup>33</sup> where it was said that the bed of Lake Michigan was held

30. *Supra*.

31. 121 Ind. 51. See *Kean v. Calumet etc. Co.*, 192 U. S. 452 and the dissenting opinion by Mr. Justice White.

32. *Seaman v. Smith*, 24 Ill. 521. It is submitted that it is not, as stated by the court, for the reason of the absence of current in the water of Lake Michigan, or because of its shape approximating circular in form or otherwise, or any questions of difficulty in the ascertainment of boundary lines between riparian or shore owners, and the extension of such lines into the lake, that the boundary rights of such owners are limited to the water and do not extend beyond. Such statement as given above as reasons for the limitation of grants by the United States of land bordering the water of Lake Michigan does not indicate much careful thought or reflection. The limitation exists solely because the United States did not own or ever did own the bed of Lake Michigan, and consequently its grants of shore land could not embrace land that it did not own, but were limited to the edge of the water. The United States did not then own the bed, and does not now own the bed because it had been dedicated by the United States to the public as a "common highway." Title to land, whether submerged or not, does not come to the state at the mere bidding of a court, having no power to legislate or to disturb vested rights, nor does the argument *ab inconvenienti* justify the abandonment of the rule of the common law.

33. 162 Ill. 145 (1896).

by the state in its sovereign capacity in trust for the people of the entire state for the purposes of navigation and fishing. That case proceeds largely upon the rule in the case of *Illinois Central R. R. Co. v. Illinois*<sup>34</sup> above referred to.

*Inland Lakes.* The condition of the law in Illinois upon the question what is the law of Illinois as to title to the beds of inland lakes, must, as above indicated, present a similar situation as in the case of streams. That being true, it is interesting to examine briefly how the cases have actually handled the problem.

The first case involved the rights of exclusive fishing by shore owners in a small lake, apparently non-navigable in fact.<sup>35</sup> The court in that case applied the same rule applied by it to streams, for it seems the plaintiffs owned all the lands on the lake. Of this case the Supreme Court of the United States said:<sup>36</sup>

"It, with other cases as to riparian rights on rivers and streams, ought to be conclusive as to the common law in that state."

The next case<sup>37</sup> involved the right and title to the bed of a lake, known as Meredosia Lake, in Fulton County. A part of the lake covered a portion of section 16, which section, alike with other similar numbered sections in other townships, had been granted by the United States to the state under the enabling act of 1818, giving the state power to sell or lease such sections for the use of schools. Thereafter the border lands, and the lake in that section, ceased to be public lands of the United States, and for that reason no part of the section could afterwards be claimed as swamp lands under the Swamp Lands Act, as was claimed in part in the case, nor could the state claim the lake for any purpose or reason whatever. The trustees of schools, therefore, had been granted and so held the proprietary right of soil in the lake bed formerly held by the United States, and a sale by the trustees to an individual would convey such proprietary right and title. The court adverting to the rule that grants of land bounding upon rivers above tide water carry exclusive right and title of the grantee to the center of the river, subject to an easement for navigation if navigable in fact, yet said:

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34. 146 U. S. 387.

35. *Beckman v. Kraemer*, 43 Ill. 447.

36. *Hardin v. Jordan*, 140 U. S. 371.

37. *Trustees of Schools v. Schroll*, 120 Ill. 509.

"A different rule applies where land is conveyed bounded along or upon a natural lake or pond; in such case the grant extends only to the water's edge." citing New England cases, unmindful of the early colonial ordinance limiting grants by the colonists upon such waters, and citing also *Seaman v. Smith*.<sup>38</sup> But notwithstanding the views of the court as to grants of the United States being limited in extent to the water's edge, the court gave title to the school trustees, suing in ejectment for the lake bed in section 16, on the ground that they had not parted with their lake lands adjacent to certain lots which they had sold, and by which the defendants claimed a part of the lake. The lots sold, did not border upon the lake, and hence defendants were not entitled to claim as shore owners, nor was it claimed, either in the decision or elsewhere, that the state had any right in the lake, and the decision given in favor of the trustees refutes any such suggestion. The case did not call for the exposition of the law governing waters, because unnecessary to the decision and hence purely *obiter dicta*. The finding that the lots sold by the trustees to Schroll did not extend to the lake determined the issue and the statement by the court that the grant by the United States to the school trustees did not include the lake would consequently leave the title to the lake bed in the grantor, the United States, holding confessedly primary title. But recovery by the trustees of schools claiming the lake bed negatives the statement that the grant to them did not embrace the lake.<sup>39</sup>

Next in order of time was a case<sup>40</sup> involving a non-navigable lake situated in part within the limits of Chicago, the other part being in the State of Indiana adjoining, which latter part was designated on the plat of the survey as "lake," the former part

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38. 24 Ill. 521.

39. Commenting upon this case, the Supreme Court of the United States said: "We cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous, and opposed to the entire course of previous decisions in that state. . . . The court, however, without, as it seems to us, being required to do so, undertook to lay down the law as to the rights of grantees of lands bordering on lakes and ponds, as distinguished from running streams, holding to the Massachusetts doctrine that such waters belong to the state and are held for the use of the public, and do not pass to the riparian proprietors. Nearly all of the authorities referred to in support of this position are decisions by the courts of Massachusetts and other New England states which follow their lead—the court not adverting to the fact that the law of Massachusetts stands on a peculiar colonial ordinance adopted more than two centuries ago, and referred to hereafter." (*Hardin v. Jordan*, *supra*.)

40. *Fuller v. Shedd*, 161 Ill. 462.

"navigable lake," the original surveys having been made by different surveyors. The lake was found to be non-navigable. The controversy arose between grantees of patentees under the original survey in Illinois in 1834, and subsequent patentees under a survey made in 1874 of the lake bed alone, which latter survey was made by direction of the general land office, claiming beds of non-navigable lakes as still being public land. The chancellor, the late Murray F. Tuley, held against the second patentees, and extended the shore tracts so as to embrace the lake bed lying in Illinois, following the Supreme Court of the United States, as found in *Hardin v. Jordan*.<sup>41</sup> The second patentees appealed, and the Illinois Supreme Court reversed the holding of the chancellor, upon grounds discussed hereinafter.

The decision in *Fuller v. Shedd* was by writ of error presented for review to the Supreme Court of the United States.<sup>42</sup> That court affirmed the decision of the Supreme Court of Illinois, apparently under the rule of *Hardin v. Jordan*,<sup>43</sup> that the bed of the lake or portion thereof, could belong to Hardin, only as an incident to the land which he owned on its shores and that whether it passed as such incident or not depended on the Illinois law; that by virtue of the later pronouncement of the Illinois Supreme Court, it appeared that the court in *Hardin v. Jordan* was mistaken as to what the Illinois law was; that under the Illinois law the bed did not pass to the riparian owner as an incident; and therefore the decision of the Illinois court must be affirmed so far as it involved the right of Hardin to any part of the bed of this lake by virtue of ownership on the shore.<sup>44</sup>

Following *Fuller v. Shedd* is presented a case<sup>45</sup> involving Sunfish Lake, in Carroll County, in which it was stated:

"The law of this state, as repeatedly announced is, that the shore owner on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state."

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41. 140 U. S. 371.

42. *Hardin v. Shedd*, 190 U. S. 508.

43. 140 U. S. 371.

44. The court said: "The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water . . . passed to the state on its admission, or otherwise, apart from the Swamp Land Act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point:" (140 U. S. 519).

45. *Hammond v. Shepard*, 186 Ill. 235.



A more correct statement would have been, that it had been announced "only in *Fuller v. Shedd*," rather than "repeatedly," for the court could have referred only to that case, which stood alone as announcing such doctrine, and consequently did not have the significance supposed. Following that comes *Schulte v. Warren*<sup>46</sup>. In that case the court uses language as follows (p. 117):

"But in case of a natural lake or bed of water meandered by the government, the grant extends to the water's edge, while the ownership of the bed of the lake is in the state in trust for all the people for the purpose of fishing, boating and the like."

The cases<sup>47</sup> cited by the court in support of this language, it seems, do not apply to the circumstances of that case; for in that case the question involved the rights of the public to hunt and fish in waters that had inundated lands of the complainant; the court holding that such inundation did not in fact deprive the owner of the title to his land.<sup>48</sup> The next case that throws any light upon the subject is the case of *Wilton v. Van Hessen*.<sup>49</sup> That case adopts the rule that the beds of navigable waters belong to the state (the court uses the terms "navigable" and "tide" indiscriminately), and points out that the sole warrant of the state to claim any title at all to sub-aqueous lands is based upon that rule. The court then refers to the rule set up by the Illinois cases<sup>50</sup> above cited and concludes as the only mode of reconciling the rule in those cases that it

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46. 218 Ill. 109 (1905).

47. *Seaman v. Smith*, 24 Ill. 521; *Trustees of Schools v. Schroll*, 120 Ill. 509; *Fuller v. Shedd*, 161 Ill. 462; *People v. Kirk*, 162 Ill. 138; and *Hammond v. Shepard*, *supra*.

48. Of the cases thus cited, *Seaman v. Smith*, holds, merely that the boundary line of lands on Lake Michigan is the line where the water usually stands when free from disturbing causes, and does not say who owns the bed; *Trustees of Schools v. Schroll*, also holds, merely that the riparian owner's title extends only to the water's edge, by construction of grant, and does not say who owns the bed; *Fuller v. Shedd* holds the same, and does not say who owns the bed, except insofar as such conclusion can be arrived at from the language above referred to that the state holds the same in trust for the people; in *P. v. Kirk*, the court proceeds from the rule that title to land covered by tide waters belongs to the state and then applies that to the Great Lakes as does the case of *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387-485; *Hammond v. Shepard* is the only one that extends the rule to inland lakes that are meandered, but cites no authorities.

49. 249 Ill. 182-187, 188, 189.

50. *Hammond v. Shepard*, 186 Ill. 235; *Schulte v. Warren*, 218 Ill. 108; and *Fuller v. Shedd*, 161 Ill. 462. (That being the order in which they are cited in *Wilton v. Van Hessen*.)

"Is undoubtedly based upon the ground that the federal government, by its act of meandering a lake, indicates that it is a navigable body of water, concedes that the title to the bed of the same is in the State, and by selling or otherwise disposing of the surrounding lands as bounded by the edge of the water, abandons all claim to the bed." (No authorities cited.)

THE RULE OF CONSTRUCTION IS BASICALLY WRONG WHICH CONFINES PRIVATE OWNERSHIP TO THE WATER'S EDGE IN CASES OF LAKES WHOSE BOUNDARIES ARE MEANDERED FOR THE GOVERNMENT SURVEY.

*The Premise.* From the maze of judicial interpretation above set forth, it is apparent that the rights in the lands under inland lakes in the state, whose boundaries are meandered, can be classed in one of two categories, only: They are lands under navigable waters, or they are lands under non-navigable waters.

*The United States Rule.* Under the federal rule as illustrated by such cases as *Packer v. Bird*,<sup>51</sup> *Hardin v. Jordan*,<sup>52</sup> and *Hardin v. Shedd*,<sup>53</sup> if the waters are navigable within the proper meaning of that term,<sup>54</sup> then the title is in the state in trust for the people; but if the waters are non-navigable, then the title is in the United States unless it passed out of the federal government by force of the grant of lands upon the shore, and the question if it did pass out of the United States is one of construction of the grant, depending upon whether, under the law of the state where the land lies, such bed passes as an incident to the land on the shore, or not.

*The Illinois Rule.* In the face of the uncertain reasons given for its decisions, the real reason for the Illinois rule is in doubt. The only thing that is clear from those authorities is, that the land under meandered inland lakes in Illinois does not belong to the riparian owners by construction of grant or otherwise.

*The Suggestion that the United States Rendered Such Lakes Navigable by Meandering their Boundaries.* It is not believed that the Illinois Court will adopt the suggestion in *Wilton v. Van Hessen*,<sup>55</sup> that the act of meandering operated as some kind of a concession that the lakes were navigable. This is flatly in conflict

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51. 137 U. S. 661.

52. 140 U. S. 371.

53. 190 U. S. 508.

54. If the English common law definition is to be applied, then there are no such waters in Illinois.

55. 249 Ill. 189.

with the explicit ruling of the United States Supreme Court.<sup>56</sup> Meander lines are of no particular significance except for the convenience of the land department in figuring the acreage of the land sold.<sup>57</sup>

When the State of Illinois claims title to any part of that which was the public domain at the time of the admission of the state into the union, it must, in order to establish proprietary right, trace title from the United States, as it could do as to certain lands donated to the state for schools, for reclamation of swamp lands and certain land in aid of railroads; but no claim of title can be exercised by the state without showing, as an individual is required to show, the source from which, and whereby title is derived. Whether or not the state acquired title to such waters as were navigable, under the provision of the dedicatory act by the compact with Virginia or, as some courts have held, that the new states acquired such title by their inherent sovereignty and admission into the union upon the same footing as the original thirteen states concerning tide waters, the result is the same.<sup>58</sup> It is here contended, however, that the reasons for state ownership of navigable waters, as herein stated, are sounder in logic and reasoning than are otherwise advanced; but aside from the distinction claimed, one would be bold, indeed, who asserted that the state for any reason was entitled to claim for itself the beds and waters of such as were

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56. *Railroad Co. v. Schurmeier*, 7 Wall. 284 (U. S.); *Hardin v. Jordan*, 140 U. S. 371.

57. The suggestion of abandonment of the property of the United States by the mere ministerial method adopted by a department of the government in order to be able to estimate the area of a fractional section existing in consequence of running section lines in accordance with the laws of Congress, to their interruption by bodies of water, invites comment. In the survey of the public lands, including those adjoining the great rivers of the Northwest Territory, the rectangular system of surveying was first adopted, all rivers both navigable and non-navigable, were meandered, yet in neither case did that method have any other significance than to give data from which an estimate might be made of the area of a given fraction. Certainly, it did not have the effect of transferring title from the United States to the state. That such power of abandonment of the public lands was vested in the Land Department, unauthorized by any act of Congress, is too plain an error to admit of discussion; nor did, nor could, such line make a non-navigable body of water a navigable body. Mr. Lincoln, on a memorable occasion said: "Calling a sheep's tail a leg did not make it a leg." Nor are meander lines shown on the plats of the surveys made by the government, as stated, the learned Court being mistaken in this regard.

58. *Wilton v. Van Hessen*, 249 Ill. 182 (1911).

not navigable. As well claim that because the original states were made a federal union, having, each, title and dominion of all unsold lands within their respective limits, Illinois, in order to be on an equal footing with them, should have, likewise, that part of the public domain falling within its borders. Nor has the "equal footing" theory ever been advanced by the courts of any one of the other four states, which, with Illinois, were carved out of the Northwest Territory. They, all, with Illinois, adopted by statute the common law, as they were required to do under the provision of the compact between Virginia and the United States, which provided that

"The inhabitants of the territory northwest of the Ohio River were always to be entitled to judicial proceedings according to the course of the common law."<sup>59</sup>

*The Theory that the Bed of Such Lakes Must Pass, if at all, as an Incident to the Land Bordering the Shore.* Possibly, assuming for that purpose that the theory is itself sound which is denied, the result reached by the Illinois courts would be logical to the extent that it confines the limits of a riparian owner on such lakes to the water's edge, and if it left the title to the bed in the United States. For this theory says that the bed must pass out of the United States, if at all, by force of the grant. Inasmuch as the grant does not in terms embrace the sub-aqueous lands, they can only pass by implication, from a construction of the grant, and the only way in which the state law can at all affect the construction of the grant, is by terming the sub-aqueous land incident to the riparian. If that be the proper rule to apply, and assuming further (to go the length with the Illinois court) that no water is navigable within the definition of the term, except tide water of which there is none in Illinois, the beds of all bodies of water in Illinois are still in the United States, because in this state, land cannot pass appurtenant to or as an incident to land.<sup>60</sup> The result is equally confusing when an attempt at reconciliation is made by adopting some other definition of the meaning of "navigability."

But the Illinois cases, as set forth above, do not proceed upon any such theory. One theory advanced is that the same rule should

59. *Stoner v. Rice*, 121 Ind. 51; *Kean v. Roby*, 145 Ind. 221; *Lorman v. Benson*, 8 Mich. 26; *Rice v. Ruddimann*, 10 Mich. 125; *Grand Rapids Ice Co. v. S. Grand Rapids Ice Co.*, 102 Mich. 227; *Lembeck v. Nye*, 47 Ohio, 336; *Diedrich v. N. W. U. Ry. Co.*, 42 Wis. 248.

60. *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410.

apply to meandered inland lakes that is applied to Lake Michigan,<sup>61</sup> and in support of that theory the court cites a Maine case.<sup>62</sup> The Maine citation has no bearing whatever, because Maine was originally a part of Massachusetts and subject to the colonial ordinance. The methods of surveying were different in the original states from those adopted for the public lands. Meandering of lands was unknown in Maine, and in fact that method obtained only in the case of public lands, and then only as a rule adopted in the general land office as a method for estimating the area of fractional parts of the public land. The same case suggests as another reason for holding that the riparian ownership extends only to the water's edge, that "the irregular borders of a lake would render the determination of lines in the bed of the lake between riparian proprietors, of almost impossible solution." The logic of such reasoning cannot be otherwise than because of supposed mathematical difficulties the rights of the shore owner of the lake must be taken by the state! Reflection, however, will remind that reasons of mere difficulty are not sufficient to justify an abandonment of common law rules;<sup>63</sup> besides it will be difficult to understand how the state can, for that reason, become vested with title. If grants by the United States, holding title primarily, do not by their own force, convey in extent full title, the natural consequence would be that such part not conveyed, would still remain in the United States. Certainly, it is plainly apparent that the state, for such reason, cannot establish title or just claim to it.<sup>64</sup> Still another reason advanced by the court in the *Fuller v. Shedd* case was, that it has been the policy of the state to stock its waters, both lakes and streams, with fish for the benefit of the public in the state, and if the rule thus limiting riparian ownership be departed from "the small non-navigable

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61. *Fuller v. Shedd*, 161 Ill. 462.

62. *Bradley v. Rice*, 13 Me. 201.

63. *Hardin v. Jordan*, 140 U. S. 371-397. (The court here considered the rule *ab inconvenienti* as no reason for depriving the riparian owners, but that it should be left to them to fight out the question of apportionment.)

64. The English courts found no such difficulty in giving to private owners the bed of a lake sixteen miles long and eight miles wide. *Bristow v. Cormican*, 3 App. Cas., 641 (cited in *Hardin v. Jordan*, 140 U. S. 371). The Illinois court itself has adopted a rule of proportions in figuring title to the bed of a stream that belies this contention *ab inconvenienti*. Thus in the case of *Kinsella v. Stephenson*, 265 Ill. 369, referred to at the outset of this article the rule of filling out of fractional quarters was applied.

lakes would become the private waters of riparian owners, pertinent to their lands, with exclusive rights thereon as to boating, fishing and the like, from which the body of the people would be excluded—a principle inconsistent with and not suited to the condition of our people nor called for as a rule of law.” It should be noted this argument is expressly applied by this language to streams as well, as to which the court found no such scruples against excluding the public from fishing,<sup>65</sup> so that this reason accomplishes its own refutation. But reflection at once indicates the superficialness of such argument. There are numerous meandered lakes in the state surrounded by privately owned lands, which lakes are inaccessible except over such privately owned lands. How are the public to enjoy rights of fishing in such lakes? *A fortiori*, how is the state to stock such lakes? Yet the state owns the bed according to the rule in Illinois. Such argument would lead to the answer that the state might exercise powers of eminent domain to obtain access for the public to such lands.

But with reference to the particular lake involved in this case of *Fuller v. Shedd*, it should be noted that part of it lies in the State of Indiana and that the title to the lands bordering that part of the lake in Indiana remained in the United States until the passage of the Swamp Lands Act, when that state, by the descriptions given in the original survey to shore lands, acquired them, becoming thereby a shore owner. The state sold these lands by the same descriptions, individual purchasers becoming thereby successors of the state, as such shore owners. Title to the border lands of the lake in Illinois were acquired by individuals before the passage of the Swamp Lands Act, they succeeding the United States as shore owner. The Supreme Court of Indiana held that the grants from the United States to the state, and by the state to the shore owners, embraced the part of the lake in Indiana.<sup>66</sup> A novel situation is thus presented. There is individual ownership of the lake in Indiana, leaving to the proprietors their right to develop commercial requirements naturally arising in the locality, while like right is denied to the shore owners in Illinois, although

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65. *Beckman v. Kraemer*, 43 Ill. 447; *Schulte v. Warren*, 218 Ill. 108.

66. *Kean v. Roby*, 145 Ind. 221.

on the same lake, title to both parts of the lake, that in Indiana, as well as that in Illinois, being derived alike from the United States holding primary title thereto, and passing to shore purchasers in each state alike without limitation.

It may be stated here as a matter of significant importance, that in respect to the limitation placed by the Supreme Court of Illinois upon the shore owners' right of use of a non-navigable lake, this state stands alone of all the five states formed out of the Northwest Territory, with the single exception of Wisconsin, the decisions of that state not being harmonious. All the other states have conceded ownership of non-navigable lakes to the shore owners, in accordance with the compact between Virginia, the original owner, and its grantee, the United States.<sup>67</sup>

The court in *Fuller v. Shedd*, it may be remarked, was concerned beyond necessity, lest the United States did not receive pay for the submerged land of the lake, unmindful that its grants included without compensation the beds of the great rivers of the state; also that it was solely a matter for the government to determine, and it was not complaining.

But the court, it seems, has not been consistent even in holding that a riparian owner takes only to the water's edge. In *Trustees of Schools v. Schroll*,<sup>68</sup> the court gave judgment to the trustees of schools against Schroll, who was in possession, of that part of the lake lying in section 16, claiming the section as they did under the grant from the United States. Such judgments could not have been consistently given to the trustees if the title to the lake bed had already passed from the United States to the state, as the court would in *Fuller v. Shedd* have it appear. It becomes pertinent to ask, By what power, authority, and by what instrument, did the United States convey its title to the lake bed to the state? The only answer that has been offered is because the lake had been meandered! It is to be noticed that Meredosia Lake was, like Wolf Lake, meandered; yet, notwithstanding, the trustees of schools re-

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67. *Stoner v. Rice*, 121 Ind. 51; *Kean v. Roby*, 145 Ind. 221; *Rice v. Ruddimann*, 10 Mich. 125; *Grand Rapids Ice Co. v. S. Grand Rapids Ice Co.*, 102 Mich. 227; *Lembeck v. Nye*, 47 Ohio 336; *Diedrich v. N. W. U. R. Co.*, 42 Wis. 248.

68. 120 Ill. 509.

covered! Indeed, like that part of Wolf Lake in Illinois, Meredosia Lake, in addition to its name as given in the original survey, it will appear, was designated "navigable." Thus, Meredosia Lake, like Wolf Lake, has two classes of ownership, individual under the school trustees for one part, and public ownership under *Fuller v. Shedd*, for another part. An anomalous position truly.

*The Rule that the Beds of Non-Navigable Waters Pass as Incidents to the Riparian Lands Is Not Sound.* It is submitted, however, that the rule that found its inception, apparently, in the case of *Packer v. Bird*<sup>69</sup> and was applied in *Hardin v. Jordan*<sup>70</sup> is faulty even if it be considered it operates in Illinois to leave the title to the lands under such waters in the United States, and the authority for that position is suggested in the dissenting opinion of *Hardin v. Jordan* itself. As suggested there, the theory that must govern the passing of any part of the bed of such water is one of presumption and not of appurtenance, for land cannot be appurtenant to land. If the rule is one of presumption, then it involves the meaning of the federal grant, and that must be determined by the laws of the United States.<sup>71</sup> It would seem unquestioned that the laws of the United States would give to the riparian owner the subaqueous land adjacent to the riparian lands,<sup>72</sup> under a rule of construction to be governed by federal decisions.

*The Rule of Construction Which Permits the Filling Out of a Fractional Quarter Section so as to Embrace Sub-Aqueous Lands Is, Also, Wrong.* The rule applied by *Kinsella v. Stephenson*<sup>73</sup> as borrowed from the Indiana case invites criticism because it, like the other rules above analyzed and shown groundless, is a mere makeshift, induced, doubtless, by a desire in some way to regain the beaten track of judicial travel. Congress did not authorize any such extension of sectional lines; and if riparian owners are entitled to any part of the bed at all, it must be by force of the law that includes in the original grant by construction a part of such

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69. 137 U. S. 661.

70. 140 U. S. 371.

71. *Wilcox v. McConnell*, 38 U. S. 517.

72. *Railroad Co. v. Schurmeier*, 7 Wall. 284 (U. S.); see note to *Gowenour v. National Ice Co.*, 18 L. R. A. 695.

73. *Supra*.



bed. The only known rule of law that permits that, is the common law rule that gives to riparian owners the bed of non-navigable waters to the center or thread of the water.<sup>74</sup>

*In Conclusion.* It is to be hoped that some solution based upon an acceptable foundation will soon be worked out to dissipate the confusion which thus exists. An achievement of such attainment, doubtless, will receive everlasting appreciation of both the laity and the bar.

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74. *McCormick v. Huse*, 78 Ill. 363; *Wonson v. Wonson*, 14 Allen 71 (Mass.); *Jones v. Lee*, 77 Mich. 35; *Blodgett v. Davis L. Co.*, 87 Mich. 498; *Crandall v. Allen*, 118 Mo. 403; *Mulroy v. Norton*, 100 N. Y. 424; *City of St. Louis v. Ruiz*, 138 U. S. 226.

# IMPORTANT BILLS PENDING IN THE ILLINOIS GENERAL ASSEMBLY<sup>1</sup>

COMPILED BY HERBERT HARLEY<sup>2</sup>

## HOUSE

### REFERRED TO COMMITTEE ON BANKING

*Blue Sky Law.* House No. 31: Scanlan.—To regulate sales of investment securities under license.

*Private Banks.* House No. 37: Thon.—To amend "an act concerning corporations with banking powers" so as to forbid private banking.

### REFERRED TO COMMITTEE ON CIVIL SERVICE

*Civil Service.* House No. 8: Carter.—To regulate civil service in counties of 150,000 or more. (Senate Bill 85).

*Civil Service.* House No. 90: Lyle.—To regulate civil service in counties of 150,000 or more and in counties which adopt the act.

*Civil Service.* House No. 91: Lyle.—To regulate civil service in sanitary districts by amending "an act to create sanitary districts, etc.," approved May 29, 1889.

*Civil Service.* House No. 94: Church.—To bring employees of the Chicago Municipal Court under the classified civil service of the City of Chicago.

*Civil Service.* House No. 243: Seif.—To bring Chicago Municipal Court employees under the classified civil service of the City.

### REFERRED TO COMMITTEE ON CHARITIES

*Delinquent Children.* House No. 166: Shephard.—To amend "an act relating to children, etc.," approved June 4, 1907, to provide for destroying the record after two years of good behavior.

### REFERRED TO COMMITTEE ON EDUCATION

*School Board.* House No. 69: Hicks.—To amend an act to provide for the appointment of school directors, etc., approved May 29, 1879, to provide that in districts having a population of 45,000 or more, the board shall consist of 11 members appointed by the Mayor.

*Vocational Education.* House No. 118: Young.—To provide state aid for vocational schooling.

*School Board.* House No. 252: Mueller.—To amend Sections 128 to 139 of "an act to establish and maintain a system of free schools," approved June 12, 1909, so that in cities exceeding 100,000 the board shall consist of 11 members appointed by the Mayor. (Senate Bill 56).

*Community High Schools.* House No. 268: Perkins.—To amend "an act to establish and maintain a system of free schools,"

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1. The bills selected are those thought to be of interest to the legal profession, and worthy of being called to their special attention. The bills are arranged under the committees to which they have been referred, with their respective numbers, and the names of the legislators introducing them.

2. Professor of Legislation in Northwestern University School of Law.

approved June 12, 1909, and to repeal "an act to provide high school privileges, etc.," approved June 26, 1913.

*Community High Schools.* House No. 274: Wilson.—This bill affects the same acts as No. 268.

#### REFERRED TO COMMITTEE ON ELECTIONS

*Judicial.* House No. 112: Thon.—To govern the election of all judges in Cook County.

*Chicago.* House No. 125: Burns.—To provide non-partisan election for all elective officers in Chicago, including Municipal Court judges and officers.

*Chicago Municipal Court.* House No. 222: Hamlin.—To provide for non-partisan elections of Municipal Court judges.

#### REFERRED TO COMMITTEE ON INDUSTRIAL AFFAIRS

*Women Workers.* House No. 126: Carter.—To amend and strengthen "an act to regulate and limit the hours of employment of females, etc.," approved June 15, 1909.

*Minimum Wage.* House No. 202: Burns.—To establish a minimum wage commission.

#### REFERRED TO COMMITTEE ON INSURANCE

*Insurance.* House No. 196: Scanlan.—To regulate the insurance business and license agents.

*Life Insurance.* House No. 228: Sidney Lyon.—To prevent splitting commissions.

*Life Insurance.* House No. 229: Sidney Lyon.—To provide for licensing life insurance agents.

#### REFERRED TO COMMITTEE ON JUDICIARY

*Collection Agencies.* House No. 1: Bippus.—To regulate same.

*Criminal Code.* House No. 9: Dahlberg.—Provides penalty from one to five years for keeping saloon open on Sunday.

*Compensation for Accident.* House No. 17: Gregory.—To amend the title of and Section 4 of "an act to promote the general welfare . . . by providing compensation for accidental injuries, etc."

*Criminal Code.* House No. 20: Jackson.—Adding section 261a, which prohibits keeping open on Sunday any shops except in cases of convenience, necessity or charity. Places of refreshment, barbershops, drug stores, etc., are excepted.

*Practice of Law by Corporation.* House No. 25: Lyon.—Bar Association Bill to prevent practice of law by corporations.

*Convict-Made Goods.* House No. 33: Shurtleff.—Forbidding sale of such goods without license.

*Inheritance by Murderer.* House No. 39: Wagner.—Murderer barred from profiting by his crime. (Senate Bill 50).

*Separating Wholesale and Retail Liquor Businesses.* House No. 44: Dahlberg.—No person interested in a brewery or distillery may have a financial interest in a dramshop.

*Bastardy.* House No. 62: Thomas Curran.—Provides fine not

to exceed \$3,000 for father of an illegitimate child and repeals all acts on this subject.

*Uniform Sales Act.* House No. 63: DeYoung.—Amending Section 64: Action for damages for non-acceptance of goods.

*Usury.* House No. 67: Hicks.—To regulate the business of lending in sums less than \$300 and to restrict the rate of interest to 7%.

*Recovery of Public Money.* House No. 97: Conlon.—To recover public money that has been illegally disbursed.

*Real Estate Sales.* House No. 110: Meents.—To require real estate leases to be in writing.

*Dramshop.* House No. 119: Placek.—To forbid aliens to conduct saloons.

*Dramshops.* House No. 124: Bruce.—To forbid the sale of liquors which contain more than 10 per cent alcohol.

*Injunctions.* House No. 128: Davis.—To amend Section 13 of Chapter 69 to permit trial by jury.

*Municipal Courts.* House No. 159: Roderick.—An act to establish municipal courts in all incorporated towns having 14,000 inhabitants or over.

*Criminal Code.* House No. 186: Wagner.—To permit the court to direct that a prisoner's earnings, not exceeding \$1.00 per day, shall be paid to his dependents.

*Installment Sales.* House No. 194: McCabe.—To provide for the filing of conditional contracts of sale.

*Marriage.* House No. 198: Thon.—An amendment requiring physical examination by physician before license issues. (Senate Bill 151).

*Extradition of Insane.* House No. 204: Carter.—Uniform act for the extradition of persons of unsound mind.

*Parole.* House No. 205: Caviezell.—To amend parole law so that no prisoner committed two or more times shall be eligible to parole.

*Foreign Wills.* House No. 211: DeYoung.—Uniform foreign probate act.

*Eastland Disaster.* House No. 237: Roderick.—To appropriate \$10,000 to surviving relatives of every victim.

*Corporations.* House No. 240: Scanlan.—To permit corporations to hold stock in subsidiary corporations. (Senate Bill 27).

*Jury in Criminal Case.* House No. 239: Roe.—To forbid jury to fix punishment, except in capital cases, under state reformatory act.

*Race Discrimination.* House No. 244: Shurtleff.—To prevent discrimination in respect to accommodation, amusement, etc.

*Medical Practice.* House No. 266: Guernsey.—To amend the practice of medicine act to extend privileges to osteopaths.

*Criminal Corporation.* House No. 269: Hamlin.—Adding sections 350-A, 350-B and 350-C to the criminal code.

*Strikes.* House No. 270: Tuttle.—To forbid injunctions against picketing.

## REFERRED TO COMMITTEE ON JUDICIAL DEPARTMENT AND PRACTICE

*Probate.* House No. 40: Wagner.—Provides severe penalty for any Probate Court judge who advises or assists in the preparation of any petition, report, or other document in a case, and likewise for the beneficiary of such assistance. (Senate Bill 42).

*Redemption.* House No. 104: Hicks.—To amend numerous sections of "an act in regard to judgments, etc.," approved March 22, 1872.

*Masters.* House No. 115: Walters.—To provide a special master in case of disqualification.

*Practice Act.* House No. 129: DeYoung.—This is the Illinois State Bar Association Practice Act. It is accompanied by an interesting commentary.

*Equity.* House No. 130: DeYoung.—To provide simplified procedure in equity.

*Rule in Shelley's Case.* House No. 172: Ellis.—To abolish the rule.

*Contingent Remainder.* House No. 173: Ellis.—Provides that a contingent remainder shall not be destroyed by act of the parties.

*Arbitration.* House No. 175: Hamlin.—To revise the arbitration act.

*Justice Court.* House No. 275: Hennebry.—To authorize circuit courts to transfer to county courts appeals from justices.

## REFERRED TO COMMITTEE ON LICENSE AND MISCELLANY.

*Sparring Matches.* House No. 13: Epstein.—To establish a state athletic commission to control public exhibitions.

## REFERRED TO COMMITTEE ON MILITARY AFFAIRS

*Military Training.* House No. 151: Hamlin.—To establish a state military training commission.

## REFERRED TO COMMITTEE ON MUNICIPALITIES

*Police Board.* House No. 43: Clettenberg.—To create a board of police commissioners in cities exceeding 200,000.

*Sanitary District.* House No. 140: Hull.—To reduce the territory of the sanitary district of Chicago to the corporate limits of the city and form a new district from the remainder.

*Convention Hall.* House No. 207: Dahlberg.—To permit cities over 100,000 to own municipal convention halls.

*City Manager.* House No. 214: Dudgeon.—To amend the cities and villages act so that municipalities under commission form of government may adopt the city manager plan.

*Eminent Domain.* House No. 219: Guernsey.—To enable park commissioners to widen boulevards.

*City Zones.* House No. 220: Guernsey.—To amend "an act to provide for the incorporation of cities and villages," approved April 10, 1872, so that municipalities may establish zones for residence and industries.

## REFERRED TO COMMITTEE ON PUBLIC UTILITIES

*Sale of Franchise.* House No. 171: Desmond.—To forbid sale of franchise to foreign corporation.

*Railroads.* House No. 188: Igoe.—To require electrification in cities of 500,000 or more after completion of new terminals.

*Railroads.* House No. 209: Dahlberg.—To create local transportation districts in cities of 500,000 or more. (Senate Bill 138).

*Public Utilities.* House No. 210: DeYoung.—To authorize cities of 200,000 or more to regulate public utilities. (Senate Bill 139).

*Railroads.* House No. 261: Boyd.—To amend "an act to provide for the regulation of public utilities," approved June 30, 1913, by adding a section to provide a penalty against carriers which do not advance loaded cars an average of 50 miles every 24 hours.

## REFERRED TO COMMITTEE ON TEMPERANCE

*Dry Districts.* House No. 45: Church.—To provide for the creation of anti-saloon residence districts. (Senate Bill 87).

*Prohibition.* House No. 73: Thomas E. Lyon.—To prohibit the manufacture and sale of intoxicating liquor. (Senate Bill 52).

## REFERRED TO COMMITTEE ON WATERWAYS

*Sanitary District.* House No. 216: Fieldstack.—To transfer the powers and duties of the sanitary district board to the State Department of Public Works.

## SENATE

## REFERRED TO COMMITTEE ON BANKS

*Payment of Deposits.* Senate No. 152: Austin.—To amend "an act concerning a corporation with banking powers" to provide that payment to either of two persons, in whose name a deposit has been made, will be a discharge, and providing for referendum.

## REFERRED TO COMMITTEE ON CHARITABLE INSTITUTIONS

*Discharged Prisoners.* Senate No. 74: Kessinger.—To amend "an act relating to employment offices and agencies" to permit of obtaining employment for discharged prisoners.

## REFERRED TO COMMITTEE ON JUDICIARY

*Foreclosure.* Senate No. 29: Denvir.—To amend "an act to regulate the foreclosure of chattel mortgages, etc.," approved June 5, 1889, so that there shall be foreclosure in case more than 5 per cent has been paid on an installment contract.

*Jury Trial.* Senate No. 58: Jewell.—To amend Section 11 of division XIII of the criminal code to provide that "juries in all criminal cases shall be judges of the facts only, and not of the law, but shall take the law of the case from the court."

*Labor Unions and Injunctions.* Senate No. 60: Latham.—To make lawful certain organizations of employees and to limit the issuing of injunctions.

*Damage Suits Against Municipalities.* Senate No. 91: Dailey.—To amend section 2 of "an act concerning suits of law for personal injuries against cities, villages and towns."

*Corporations.* Senate No. 99: Bardill.—To amend sections 1, 3, 4 and 7 of "an act to provide for changing the name, etc., of incorporated companies," approved March 26, 1873.

*Third Degree.* Senate No. 104: Jewell.—To prevent improper treatment of prisoners with regard to obtaining confessions.

*Blue Sky Law.* Senate No. 125: Thornbaugh.—To prevent fraud in the sale of securities.

*Feeble-minded.* Senate No. 128: Jewell.—To amend "an act to better provide for the care and detention of feeble-minded persons," approved June 24, 1915, so that an alleged feeble-minded person may demand trial by a jury of six.

*Improper Entertainment.* Senate No. 129: Barbour.—To amend the criminal code by adding section 224½ concerning indecent shows.

*Improper Entertainment.* Senate No. 130: Barbour.—To provide that places where indecent shows are presented are public nuisances and for their abatement by suit in chancery.

*Interpleader.* Senate No. 132: Barr.—To amend the chancery practice act by adding section 50a, which provides for interpleader.

*Attorney Fee.* Senate No. 137: Coleman.—To amend "an act to promote the general welfare . . . by providing compensation, etc., approved June 28, 1913, by adding section 22a so that attorney fees may be obtained in certain cases.

*Change of Venue.* Senate No. 143: Jewell.—To amend the justice court act to enlarge the right to change of venue.

*Justice Courts.* Senate No. 164: Roos.—To amend the justice court act in numerous particulars.

#### REFERRED TO COMMITTEE ON MUNICIPALITIES

*Chicago City Officials.* Senate Nos. 37 and 65: Glackin.—To amend "an act to provide for the incorporation of cities and villages," approved April 10, 1872, to provide for the appointment of the clerk and treasurer and the election of aldermen for a term of four years in the City of Chicago.

*Chicago Local Government.* Senate No. 141: Hull.—To consolidate the local governments within the City of Chicago.

#### REFERRED TO COMMITTEE ON PUBLIC EFFICIENCY

*Factory Inspection.* Senate No. 112: Austin.—To amend the factory inspection act, approved June 3, 1907.

#### REFERRED TO COMMITTEE ON PUBLIC UTILITIES

*Public Utilities.* Senate No. 121: Kessinger.—To amend the public utilities act, approved June 30, 1913, so as to include certain stockyards and stock commission merchants.

#### REFERRED TO COMMITTEE ON REVENUE

*Corporations.* Senate No. 41: Manny.—To amend "an act to regulate the admission of foreign corporations, etc.," approved May 18, 1905.

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## CORRESPONDENCE

### A VOICE OUT OF THE EAST

TO THE EDITOR OF ILLINOIS LAW REVIEW:

The vaguely applied term "the Orient" is popularly conceived to represent a vast and sleepy region somewhere east of Suez backward in all branches of learning. It could of course be easily demonstrated that around the cycle of world events, many times the West has merely followed in the footsteps of the East and rediscovered what has been known for centuries to their brethren



on the other side of the globe. Nevertheless, those whose good fortune it is to live in the Orient are still thought of as benighted and unfortunate beings.

It is, therefore, with some pleasure that I make known to you that for once at least we can prove that the East has gotten ahead of the West. I refer to the action of Northwestern University in instituting a four-year law course, described by Dean Wigmore on page 362 of the issue of *ILLINOIS LAW REVIEW* for December, 1916. He states that "Northwestern University in this *November (1916)* prescribes four years of law studies (*88 units*) for the law degree; the rule to be effective from *September, 1918*." The College of Law, University of the Philippines, has had an optional four-year course from the date of its establishment on *January 12, 1911*. In *March, 1916*, the College of Law, University of the Philippines, provided that beginning with the academic year 1917-8, *July 1, 1917*, the three-year course should be discontinued and the four-year course made fundamental with *110 units* required for graduation. Although it is extremely difficult for us slow mortals in the Orient to keep up with the rapid pace set by those progressives in the teaching of the law, Pound, Wigmore, Bates, and others, I think that for once we may exult over the fact that we are ahead of them and are the first law school under the American flag (so far as we know) to establish the four-year law course predicated on two years of College preparation.

We also humbly believe that we have a few other ideas in force in our law school to which others will come in time. Just as one example, proved successful not as a matter of theory but as a matter of practice, we insist on two introductory courses in the first semester of the Freshman year, one known as Institutes of Roman Law introducing the civil law, and the other for want of a better name entitled Elementary Law introducing the common law. These two courses together give the new students a systematic idea and classification of the law, and in all the courses which follow, this systematic idea is gone back to and closely adhered to. Then in the last semester of the senior year we give courses under the name, for want of a better description, of Code Review—Civil Law, Mercantile Law, Remedial Law, and Public Law—which bring together again in systematic order all the previous courses of the curriculum and review them for the student just previous to the granting of his diploma. While it is an excellent thing to make the student reason, as under the Harvard case system, while it is

an excellent thing to make his course practical, as under the Michigan practice court system, and while it is an excellent thing to give him a wide acquaintance with jurisprudence, as under the Northwestern system, is it not also just as valuable for him to be introduced to the law scientifically—not thrown in to sink or swim,—to study the law logically and in order, and to leave the law, knowing it as a science?

Very truly yours,

GEORGE A. MALCOLM.

Dean, College of Law, University of the Philippines.

[Our learned correspondent could also, of course, have called attention to a celebrated oriental example in a far-removed century (for Constantinople was officially more oriental in the 500's than Manila is today)—the *five-year* law course of Roman law: (see Justinian's "Constitutio Omnem").—Ed.]

## COMMENT ON RECENT CASES

EVIDENCE—DECLARATIONS OF INTENTION TO ACT.—In *Greenacre v. Filby*, Ill., 114 N. E. 536 (Dec. 21, 1916) the Supreme Court affirms and follows the rule in *Siebert v. People*, 143 Ill. 571, 32 N. E. 431, which has so long disfigured the practice of this state and obstructed the admission of useful evidence. It is a pity that the court adheres to that rule. There is no common sense in it, and the court's statement that "we are satisfied with the rule" is a discouraging symptom.

Here is the case: G. was run over and killed about 11:52 p. m., when lying across the railroad track. The defendant was sued on the theory that liquor sold by him had made G. intoxicated and thus led to his death. Suicide was set up as the real cause. The trial court admitted G.'s statement, made at 9 p. m. that evening, just after comparing his watch with a store clock, "I am going home, kiss my wife and babies good night, and go to bed;" he did go home, but left the house just after 10 p. m. On the other hand, the trial court excluded statements of G., (1) made two weeks previous while having a drink, that it would probably be the last drink they would have together, "that train is apt to hit me any night;" (2) that he would like to jump in front of the passenger train; (3) on the prior Sunday, that "that was the last load he was going to ship;" (4) four months previous, that life was getting to be a hard game and he was tired of it, etc. All these statements were excluded; while the statement that he was going home to bed was admitted (though the later facts showed that this statement was untrustworthy). These things the Supreme Court affirmed.

Now if the ground for excluding the expressions of suicidal intent had been their vagueness, this might have been a rational ground of distinction, though not an adequate one. But the opinion squarely holds the exclusion proper, following *Siebert v. People*, on the artificial ground that such statements must "accompany an act which they serve to characterize," or must be "in connection with an act." There is, however, no rational basis for such a limitation. Expressions of intention have more or less probative force according to circumstances, but not according to whether the speaker is doing an act or not, nor whether the act, if any, is characterized by them. When a business man is dictating his morning letters, and the telephone rings, and his fellow director asks, "Are you coming to that board meeting or not at the bank this noon?" and he replies, "Sure I am, I wouldn't miss it for anything!" this statement has absolutely no relation to the act he is engaged in, but every business man dealing with him would credit it, and its evidential value to show where he probably would be that noon is unquestionable. There is simply no common sense (or common experience, which is what that means) in the artificial limitation of *Siebert v. People*, and that is all that can be said about it.

But the opinion in *Greenacre v. Filby* tells us that if such evidence were to be admitted, "it would open a limitless field of

inquiry as to the circumstances under which the declarations were made and whether in normal conditions or at times of exceptional misfortune, discouragement, and despondency." Of course it would. Not "limitless," indeed; that is an exaggeration. But certainly, when the issue is whether a man committed suicide, we have got to inquire fully into his recent state of mind, and that is just what is done in every insurance litigation where suicide is the issue. This argument *ab inconvenienti* is not a fortunate one.

The truth is that the *Siebert v. People* rule appears to have been a miscarriage from the start. As is well known, the opinion purported to rely chiefly upon *Com. v. Felch*, 132 Mass. 22; but this case had been expressly overruled and repudiated by the Massachusetts court just two weeks before (1892), in *Com. v. Trefethen*, 157 Mass. 185, 31 N. E. 961, which was of course still unreported and unknown to the Illinois court when the opinion in *Siebert v. People* was filed; but in the *bound* volume of the Northeastern Reporter and in the Illinois Official Reporter the opinion contains a posthumous sentence (not found in the weekly original issue of the Northeastern Reporter) acknowledging that "it is true that *Com. v. Felch* has since been overruled, but nevertheless, etc." And the rule thus mistakenly adopted has never been able to be consistently applied in this state.

Being flatly contrary to common sense, every once in a while common sense breaks through and insists on recognition.

Meanwhile the rule has considerable effect in arbitrarily excluding valuable evidence. The most notable recent instance was *Foster v. Shepherd* (1913), 258 Ill. 164, 101 N. E. 411, a mysterious case on the facts, in which the deceased's declared intention of spending the night at his mother's home was excluded. According to *Foster v. Shepherd*, a man's statement that he is going to spend the night at his mother's home is excluded; according to *Greenacre v. Filby*, his statement that he is going to spend the night in his own home is admitted. Such are the arbitrary results of the impracticable rule in *Siebert v. People*. There was an inviting opportunity in the present case to repudiate it, but the opportunity was rejected.

Even taking the rule as it is, was its application consistent? G.'s statement which was admitted, that he was going home to bed, was made when he was looking at a clock to see if his watch was correct; how did this statement "characterize the transaction?" G.'s statement, which was excluded, (1) that it was probably the last drink they would take together, was made when he was taking a drink with his friend; (2) that "that train is apt to hit me any night," was made when the train was passing; (3) that "it was the last load he was going to ship" was made "while loading stock at the stockyards;" do not these expressions directly "characterize the transaction?" It would seem that the statements excluded do fit the requirements of the rule at least as well as the statement admitted. But the truth is that when a rule is based on artificiality, consistency in applying it becomes impossible.

J. H. W.

**CARRIERS—BILL OF LADING—NOTICE OF CLAIM.**—In *Northern Pacific R. Co. v. Wall*, 36 Sup. Ct. Rep. 493, the United States Supreme Court holds that whether a bill of lading for an interstate shipment of cattle over connecting lines, properly interpreted, calls for a notice of claim before removal, to be served on the terminal or upon the initial carrier, is a federal question, since the "Carmack Amendment" enters into and forms part of the contract evidenced by the bill of lading. This case is another illustration of the lengths to which the court is proceeding in asserting jurisdiction for the federal courts, under the Carmack amendment, of all matters pertaining to the liability of the interstate carrier for loss or damage to goods and to the limitation by the stipulation of such liability.

L. M. G.

**CARRIERS OF GOODS—ACCEPTANCE.**—In *Canadian Pacific Ry. Co. v. Wieland*, 226 Fed. Rep. 670, the Circuit Court of Appeals, 9th Circuit, held that where goods were, for the carrier's convenience, stored by the agent of the carrier in a government bonded warehouse prior to the beginning of the transportation, the goods must be deemed in the custody of the carrier, so that the latter was liable as insurer for their accidental loss while in the warehouse.

L. M. G.

**CONSTRUCTIVE TRUSTS—ADMISSIONS IN ANSWERS WHICH SET UP THE STATUTE OF FRAUDS.**—In *Mussey v. Shaw*, 274 Ill. 351, a widow, who was seventy-five to eighty years of age and ailing in health, conveyed a farm and an apartment building to a daughter, a skilled business woman, between whom and herself a fiduciary and confidential relation existed. The conveyance was made on the daughter's oral promise that she would pay the mother the rents, issues, and profits of the premises. The daughter, later, with the mother's knowledge and approval, exchanged the farm for another apartment building. The daughter paid the mother the rents, issues, and profits for some time, but finally stopped doing so. The mother then filed this bill to have a trust declared for her benefit in both apartment buildings (viz., the one conveyed to the daughter with the farm and the one for which the farm was exchanged), and to have them both conveyed to her free from all incumbrances except those existing when she conveyed. The daughter's answer admitted the conveyance and the promise to pay the rents, issues, and profits, but alleged that the latter were to be paid less the running expenses of the properties and interest on the incumbrances on them and that she was appropriating the rents, issues, and profits to reduce the amount paid by her for expenses and to reduce principal due on the incumbrances. The answer also set up the statute of frauds.

On this state of facts the chancellor refused to decree a conveyance but declared a trust for the mother in the net income, rents, and profits from the two properties and referred the cause to a master in chancery to state an account deducting from the

gross income, rents, and profits, interest on the incumbrances which existed at the time the mother conveyed, the incumbrances on the farm being treated as incumbering the apartment building for which it was exchanged, but not crediting the daughter with any sum paid by her to reduce principal. Both parties appealed because the complainant wanted the properties conveyed to her and the defendant wanted greater credit on incumbrances than was allowed her.

The Supreme Court, brushing to one side the defense of the statute of frauds on the ground that "the trust affirmed by the chancellor was admitted by the amended answer and therefore nothing further need be said concerning the defense of the statute of frauds set up in the same answer" (274 Ill. at p. 357), dismissed the appeal of the defendant, affirmed the part of the decree appealed from by the complainant, and directed the circuit court to proceed with the accounting, and to take any further proceedings necessary to secure to the complainant without prolonged litigation the enforcement of her rights.

As the court specifically found that a special confidential relationship existed between the parties at the time of the original conveyance on the oral promise, the enforcement of a constructive trust is fully justified: *Stahl v. Stahl*, 214 Ill. 131; *Hilt v. Simpson*, 230 Ill. 170; *Noble v. Noble*, 255 Ill. 629. But while the decision is to be approved, the *dictum* above quoted about the defense of the statute of frauds need not be. That *dictum* is inconsistent with the modern decisions, which regard it as a clear violation of the statute for a court to take away from a defendant the defense of the statute of frauds which he is insisting upon by compelling him to admit the essential facts in his answer and by treating the answer, thus secured, as the memorandum of the trust. In Browne on the Statute of Frauds, (5 ed., sec. 515) it is said:

"It was formerly held that if the defendant, by his answer in chancery, admitted the fact of the agreement [which the plaintiff charged to have been made] he could not avail himself of the benefit of the statute. Lord Macclesfield so decided, and Lord Hardwicke, if he did not actually determine the point, clearly appears to have been of the same opinion. But, by the unbroken course of modern decisions, it is now settled that although the defendant admit the agreement it cannot be enforced without the production of a written memorandum, if he insist upon the bar of the statute. As was said by Sir William Grant. 'It is immaterial what admissions are made by a defendant insisting upon the benefit of the statute; for he throws it upon the plaintiff to show a complete written agreement, and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.' *Blagden v. Bradbear*, 12 Ves. 471. The American courts have also fully accepted this doctrine."

While, as an original question, there is much to be said for the earlier view of Lord Macclesfield and Lord Hardwicke, it will not do to assume from the *dictum* in the principal case of *Mussey v. Shaw*, that Illinois is committed to their view.

G. P. C. Jr.

**BUILDING RESTRICTIONS—PORCHES.**—The law of Illinois upon that particular phase of the subject of building restrictions surrounding the construction of porches has received considerable at-

tention in the last decisions of our Supreme Court. Up to the case of *O'Gallagher v. Lockhart*, 263 Ill. 489, the important decision in this state upon the subject apparently was *Hawes v. Favor*, 161 Ill. 441. It was said in this case that an open porch, apparently one constructed of wood, was not a structure within the definition of "building" in a covenant that required the building to be inside of a certain line. In the case of *O'Gallagher v. Lockhart*, the modern form of brick porch was encountered. In that case the porch was three stories high. The railings were of solid brick and high. The steps led from the front line of the lot to the porch and had solid walls of buttresses all built of brick. From the steps large pillars extended to the roof, and the whole porch was of massive proportions. In that case the court held such modern porch was a building within the definition of "building" as used in a covenant against construction within a certain line. The court expressly distinguishes between an "open" porch such as was involved in the case of *Hawes v. Favor*, and a porch of the kind involved in the *O'Gallagher v. Lockhart* case, which the court terms a "closed" porch.

The condition of the law as represented by these two cases manifestly left untouched the situation where the building restriction expressly excepted from the restriction, "porches." In the case of *Keith v. Goldsmith*, 194 Ill. 488, our Supreme Court had occasion to pass upon the term "bay window," where that was excepted from the operation of the restriction, and it was held that a semi-polygonal projection running up from a foundation in the ground was held to come within the definition of the term, and in the case of *Loomis v. Collins*, 272 Ill. 221-232, it is suggested that a construction of the kind as used in *O'Gallagher v. Lockhart* might come within the definition of "sun porch."

In that state of the law appears the case of *Brandenburg v. Lager*, 272 Ill. 622, 112 N. E. 321, where the question was squarely raised as to whether a porch substantially such as in the case of *O'Gallagher v. Lockhart* came within the definition of porch where structures answering that description were expressly excepted from the building line restriction, and it was held that such a structure was a part of the building and not a porch. It should be noted that the court in arriving at its conclusion places great weight upon the factor that the floor plan of the building appeared to have embraced the porch as part of the structure.

It is interesting to note the argument of the court in the case of *Loomis v. Collins* to the effect that the difference between an open porch and a closed and brick porch is merely a matter of degree and that the degree of inclosure becomes material to the extent that it interferes with the easement of light, air, and view to which the restriction entitled the other owners.

E. M. L.

**PARTITION—REMAINDER—ESTATE TAIL.**—Under our statute on partition, it would seem that relief may be had in any case

where two or more persons are jointly interested in a piece of real estate, provided that the interests of the persons are such that the court is able to determine what share each of them is entitled to. Thus, partition may be had where there is a life estate: (*Marshall v. Marshall*, 252 Ill. 571); dower or homestead interest outstanding: (*Whittaker v. Whittaker*, 242 Ill. 146-151); and, it seems, it is no objection to the granting of relief that there is a mortgage against the property: (*Loomis v. Riley*, 24 Ill. 312; *Spencer v. Wiley*, 149 Ill. 59); or that the premises are under lease: (*Blakeslee v. Blakeslee*, 265 Ill. 55). In fact, so far as partition alone is concerned, it is necessary to join as parties only those who have joint interests: (*Miller v. Miller*, 263 Ill. 22; *Clark v. Zaleski*, 268 Ill. 431; *Navigato v. Navigato*, 268 Ill. 455); so that it is not necessary to join the wife of one of the joint owners, as her claim would attach to the share ultimately set off to her husband, nor the mortgagee of an interest: (*Loomis v. Riley*, 24 Ill. 312); nor an executor nor an administrator: (*Stollard v. Nycurn*, 240 Ill. 475).

But in order to have partition the joint interests must be defined in *quantity* so that each claimant's share can be set off to him, for that is the basis of the proceeding; so that where the life tenant is given power to dispose of part of the property and the limitation over is only of what remains, partition cannot be granted until the life tenant dies and with him his power of disposal: *Heininger v. Meisner*, 261 Ill. 105-106.

Thus in the recent case of *Richardson v. Van Gundy*, 271 Ill. 476, 111 N. E. 494, the joint interests of which partition was sought, were the statutory remainders arising in situations known at common law as estates tail; as in the example, X, testator, to A for life, remainder to the heirs of her body. Until the death of the life tenant, A, no partition could be had because the interests of the children then in existence might be reduced in quantity by the birth of other children of A. The court distinguishes the case from the situation in case of a base or determinable fee because there, while the interest sought to be partitioned might come to an end, it was nevertheless an interest certain in quantity while it lasted and there was no reason why it should not be partitioned any more than a life estate.

E. M. L.

**WILLS—GIFTS TO A CLASS—STATUTE OF DESCENT—VOID AND LAPSED DEVISES AND LEGACIES.**—A testator has two children, also a grandchild, the child of a deceased child. He knows that his deceased child is dead. He makes his will as follows: "I devise and bequeath all my property to my children, share and share alike," and dies. Does the grandchild share with the two children? Under Illinois law it would now appear that he does; for that is substantially the holding in *Kehl v. Taylor*, 275 Ill. 346.

The decision seems unfortunate and wholly unnecessary. It is based of course on section 11 of the Illinois statute of descent, which, so far as material, reads as follows:



"Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, shall die before such testator, and no provision shall be made for such contingency, the issue, if any there be, of such devisee or legatee, shall take the estate devised or bequeathed as the devisee or legatee would have done had he survived the testator."

The result of course defeats the intention of the testator, although the court does not distinctly admit it, and, in fact, appears hardly to have realized it. Sane testators are not in the habit of knowingly making gifts to the dead, and the chances are ninety-nine in a hundred that the testator here meant by "children" the children who were alive when he made the will. Indeed, one curious feature of the opinion is its reliance on the earlier decision in *Rudolph v. Rudolph*, 207 Ill. 266, where, in order precisely to avoid defeating a merely presumed testamentary intention, the statute was held to apply to gifts to classes as well as to gifts to donees by name.

The difficulty of applying the statute to gifts to classes arises from the rules concerning the determination of classes. The statute applies to "a devisee or legatee in any last will." On a gift to a class, however—for instance to "children"—the perfectly established rule is that, in the absence of a clear expression to the contrary, the class is determined as of a date never earlier than the testator's death; so, when there is a gift to "children," one or more of whom dies before the testator, if the ordinary rules of class determination are applied, the statute would not apply; since the children who would be the "devisees or legatees in" the will would be the children surviving the testator. Technically there would be no lapse, because technically there has been *no gift to lapse*. Nevertheless, in *Rudolph v. Rudolph* the court applied the statute to such a case and gave the gift to the issue of the children dying after the execution of the will; for the court saw that, though there was no technical lapse, there was, from the testator's point of view, as real a lapse as though the will had named all the children. What, in effect, the decision therefore comes to is to determine the class "children" as of the date of the will. And yet it is as plain as can be that in the instant case nothing can be accomplished by reverting to the situation at the date of the execution of the will; since the deceased child, being not only already dead then but also known to be dead, was as little within the class designation as of that date as he was at any later date. In *Rudolph v. Rudolph* the deceased child was *at one time* within the class "children"; here the deceased child never was and never could have been intended to be. How, therefore, *Rudolph v. Rudolph* can be regarded as authority for the present ruling it is impossible to see.

Can the decision be supported on any other ground? Another class of cases in which a conjectural testamentary intention would be defeated if the statute were not applied, is the class of "void" devises or legacies—gifts to persons (whether by name or as members of a class) dead when the will was made, but not known by the testator to be dead. The court in *Kehl v. Taylor* apparently assumed that no distinction can be made between gifts to a class, a

member of which is dead, but not known to be dead, and gifts to a class a member of which is both dead and known to be so; and then it argues that not to apply the statute to the former case would be to defeat the testator's intention by passing the property (under the rule as it existed before the statute) to persons to whom he would probably not have given it had he known the facts.

The assumption is wholly erroneous and the conclusion partly so. The assumption is incorrect because the distinction between the two cases is clear. A dead child known to be dead, and just because he is known to be dead, is not intended to be a "devisee or legatee" in a will under the designation "my children"; a dead child not known to be dead, and just because he is not known to be dead, is so intended. The statute, therefore, clearly should apply in the latter case,<sup>1</sup> and should not apply in the former. So that it is quite correct to apply the statute to "void" as well as to lapsed legacies. The instant case, however, is not the case even of a "void" legacy, for the simple reason that (as to the pre-deceased child) there was no legacy at all. How can a person known to be dead be the devisee or legatee of a sane testator?

The trouble with the conclusion is that in the case neither of a lapsed nor of a void legacy does the statute either carry out or defeat a testator's intention. What defeats it is death; and, since what has defeated it is death, obviously nothing short of a self-executing resurrection act could effectuate it. What such statutes do is to provide for a contingency concerning which a testator has expressed no intention whatever, because he did not consider its possibility. That this is so, is shown as clearly as can be by the words, "and no provision shall be made for such contingency." So far, then, as testamentary intention goes, the most that can be said is that the statute carries out a presumed intention—the intention which it may be guessed the average testator would have expressed if his attention had been called to the contingency.

So that the result in the instant case is to defeat an expressed intention in the interest, in another class of cases, of a conjectured intention. And this really in the teeth of the statute; since the testator *had* "provided for" the contingency—the contingency, namely, of the known death. How? Why, precisely by using the words "my children." To guess, as the legislature may have, that testators who do not foresee lapses or failures of gifts to children would, had they foreseen the possibility, have given these children's shares to their issue is very likely a pretty good guess. Hence such statutes—as the court itself argues. To guess, as the court does here, that the legislature intended to go further, and to override testamentary intentions seems a pretty poor guess.

A will, however, speaks from the testator's death and not from the date of execution; and at the testator's death the donee of a lapsed legacy is as dead as the donee of a "void" legacy. Therefore,

1. It applies literally where the gift is to a child by name; and, where the gift is to a class, the rule of *Rudolph v. Rudolph* saves the situation.

it might be argued, by way of *reductio ad absurdum* of the above reasoning, that the donee of even a lapsed legacy (and even if the gift be to him by name), is as little as the donee of a "void" legacy, a "legatee" within the meaning of the statute; and such, in fact, seems to have been the reasoning of the New York court in one of the cases relied on: *Barnes v. Huson*, 60 Barb. 598.<sup>2</sup> The fallacy is patent. The question is not who *will take* as a legatee or devisee under the will, but who is *named as* a legatee or devisee by the will. If a will contains a gift to "my son John," who subsequently dies before the testator, John is as much the legatee named in the will on the testator's death as he was when the will was drawn; he does not cease to be a "legatee in" a will by ceasing to be resident in this world. And the same is true if John was, unknown to the testator, dead when the will was drawn. In both cases John, dead or alive, always was and always will be the legatee *in the will*; though in neither case will he take. But if the gift in the will is to "my children," and if John was dead and known to be dead when the will was made, then John will not take, not because he wasn't there to take, but because he was never nominated to take—because he never was a "legatee in" a will. To give the gift to John's children in the first two cases is to substitute them for John. But to give it to them in the last case is not to substitute them for John, but to substitute them for others, who were named and who were there to take.

Possibly the best way of putting the matter is to say that the court erred not so much in construing the statute as in construing the will. To hold that the statute applies to "void" as well as to lapsed legacies seems sound; but to so apply it you must first find your void legacy, and the gift in the will in question could by no possibility be held to be a "void" gift unless it was *not* a gift to the living children alone, but to the dead child as well. That it cannot be construed as a gift to the dead child seems too obvious for argument.

The opinion relies on the maxim that all men are presumed to know the law. How this affects the question is hard to see, unless it is meant to indicate that a testator who describes a class of beneficiaries as "my children" will be "conclusively presumed" to intend by that "all the children I ever had," which, of course, is merely a fictitious way of saying that the statute was intended to defeat an expressed meaning.

What, in short, the decision in *Kehl v. Taylor* does is to rewrite the statute so as to make it read as follows: "Whenever a devisee or legatee in any last will and testament, being a child or grandchild of the testator, *or whenever any deceased child or grandchild of a testator, who, had he been living when the will was executed would have been included within the description of any class of legatees or devisees as described in such will*, shall die

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2. Our court moreover, fails to notice that this reasoning is really inconsistent with the result in *Rudolph v. Rudolph*, where, what in effect was done, was to make the will speak as of the date of its execution.

before such testator," etc. It is submitted that, whatever authority there may be to support it, the holding in *Kehl v. Taylor* is thoroughly unsound.

PHILIP L. MILLER

EASEMENTS—WHEN APPURTENANT.—The test of appurtenancy in easements would seem to be: Is the enjoyment and use of the easement in connection with a related dominant estate? Upon this question, it seems the circumstances of the case have great bearing, and the mere fact that the instrument granting the easement does not mention a dominant estate, does not make it an easement in gross. Thus, in one case the deed conveyed "lot 11, together with the right of ingress over, upon and across lot 12" and the way led to the grantee's land and was useless except in connection with it: *Whittaker v. Harding*, 256 Ill. 150. In another it was suggested that if in fact the easement has one terminus on the land of the claimant of the easement, that is enough evidence of its appurtenancy: *L. & N. R. Co. v. Koelle*, 104 Ill. 455. But it seems unnecessary in order to make an easement appurtenant to a certain piece of land, that the dominant and servient estates be contiguous; nor in fact is it necessary that the way terminate on the dominant estate. *Goodwillie v. Commonwealth Edison Co.*, 241 Ill. 42-74. In that case the way was from the dominant estate along a public road past an intervening estate and then across the servient estate.

The recent case of *Goldstein v. Raskin*, 271 Ill. 249-252, 111 N. E. 91, reaffirms the rules thus appearing. In that case the way adjoined the estate of the grantee. The court took but little time to reject the contention of the owner of the servient estate that the easement was in gross because the grant was silent as to the dominant estate, and it would seem the court was clearly right, for this case presented not only the element of connection, but also contiguity, and a situation where one terminus of the way was on the dominant estate.

E. M. L.

## BOOKS AND PERIODICALS

**THE LAW OF INTERSTATE COMMERCE, AND ITS FEDERAL REGULATION.** Third edition. By Frederick N. Judson. Chicago: T. H. Flood & Co., 1916. Pp. xxix, 1066.

This valuable work has reached its third edition. The general form has been retained. The book is divided into two parts. The first defines interstate commerce and discusses the source and extent of federal power over it. The second part analyzes, section by section, the Interstate Commerce Act, the Elkins Act, the Anti-Trust Act of 1890, and the Twenty-Eight Hour Act. An appendix states the Anti-Trust Sections of the Tariff Act, the Clayton Act, the Federal Trade Commission Act, and the several recent federal safety appliance acts; and gives forms for and rules of practice before the Interstate Commerce Commission.

The work is without introduction, opening with the commerce clauses of the federal constitution. The first chapter, which interprets those clauses, has been amended to conform to recent decisions defining interstate commerce and the taxing power of the states over property used in such commerce. A section dealing with the Webb-Kenyon Act has been added. The second chapter deals with concurrent and exclusive powers, and has been revised in the light of later cases. A section on state inspection charges has been added. Chapter three discusses federal regulation, and has been rewritten to conform to alterations in the statutes relating to the Commerce Court and the Bureau of Corporations. A section concerning rate regulation of water transportation has been added. Chapter four deals with the federal power to regulate, and has been augmented by sections on federal control over discrimination and on the commerce clause and the police power. Chapters five and six deal with business corporations and labor combinations in interstate commerce, and have been rewritten to comply with the Clayton Act, the Federal Trade Commission Act, and the labor acts of March 4 and July 15, 1913. Chapter seven has been much altered and added to, and an exhaustive discussion of the Minnesota Rate Case of 1913 has been inserted. The chapter discusses federal control of state railroad regulation.

The work is a scholarly treatment of the subject, but retains many defects which should not have reached a third edition. The style is difficult. The sentences are needlessly long and complex. The diction is not simple. A second and even a third reading of many sections is necessary to secure the meaning. A general outline of the subject is wanting. The author seems to have been full of his subject and to have poured it forth regardless of form. The paragraphs have unity of thought, but very often not of form. And the general absence of topic sentences makes the thought difficult to follow. Frequent reference to matter contained in the notes, without statement that it is to be found there, rather than in the text, adds to the confusion.

The principal defect, however, is the difficulty of access to the matter in the text. The book is indexed by section rather than page thus forcing the busy reader to run through much material which may not be of immediate interest to him. The index groups subheads, sometimes as many as a hundred, under one general classification without alphabetical arrangement, compelling the reader to hunt through all to find the one he wants. Many subjects which appear only in one section are indexed by cross-references without section number, thus necessitating a wholly unnecessary further search. Several topics treated in the text do not appear in the index at all. The table of cases is carelessly arranged with the result that the reader must search through the whole alphabetical division before he can be certain that the case he looks for has or has not been cited. And in the appendix the topic phrase-headings inserted in the body of the several acts are in many cases several lines out of place. A number of errors in proofreading, several in the citation of cases, present further difficulties.

The text itself, aside from form, leaves little to be desired. It is a careful and exhaustive treatment of this important branch of the law. Conflicts of opinion are stated, carefully considered, and the authors conclusions deduced. Leading cases have been dwelt upon at length. The notes are complete and digest the subject down to date. It is especially unfortunate that such material should be rendered so difficult of access.

Chicago.

HARLEIGH H. HARTMAN.

THE AMERICAN PLAN OF GOVERNMENT. By Charles W. Bacon. New York: G. P. Putnam's Sons, 1916. Pp. xxi, 474.

Today those restrictions which the United States constitution imposed upon the national and state governments to safeguard the individual from oppression and injustice at the hands of his government, are most frequently resorted to in order to upset legislation which on its face purports to protect that individual citizen from oppression and injustice at the hands of those huge organizations which have become a striking characteristic of modern American industry. By this new utilization of the constitutional safeguards, the constitution has been brought forward as a vital factor of the industrial and civic life of today; and it is the constitution in its broader sense—that great body of law that has resulted from over a century of constitutional construction and development by judicial decisions, not the bare written instrument—that has thus become a subject of intense interest, of discussion, and often, of criticism, to laymen as well as to lawyers. In "The American Plan of Government" this larger constitution has been made accessible to the ordinary man; the huge mass of reported cases in which this constitutional law is embodied, and which, from its very enormity, is inaccessible to any but the law student, has been reduced to its simplest terms and transformed into a vivid picture that is thoroughly intelligible to the lay reader, and yet both interesting and instructive to the lawyer.

Grouped under each clause of the constitution, pruned of legal verbiage, and introduced by careful and helpful explanation, are placed selected cases which serve to illustrate the significance and the judicial interpretation of each clause, until, bit by bit, the whole legal structure upon which the federal government rests, is laid out. Thus to follow out the constitution clause by clause brings a clear understanding of the growth of constitutional law out of the terse written constitution. But to do this as inflexibly as has been done in this book, not only causes much needless repetition, but results in the slighting of those principles of constitutional law, such as the principles which govern the territorial extension of the constitutional safeguards beyond the borders of the several states, which cannot be found in any particular clause, but arise from the nature of the government which the constitution as a whole has created. To this same rigidity is perhaps also due the failure of the book to impress one with the fact that the constitution in its broader sense is not a dead, rigid document, but a flexible, living body of law; that though the written instrument has remained almost without alteration, the constitution has so thoroughly adapted itself to changing conditions, that though it has effected results never dreamed of by its originators, it has yet, in the even more undreamed of conditions of today, attained the fundamental purposes that the constitution was established to secure.

Essentially the book is a popularization of the "case method" of legal instruction. But the case method, which aims to substitute facts for rules and definitions, not to substitute judicial statements for the statements of instructors and text writers, does not justify the insertion in this book of frequent extensive transcripts from judicial opinions; often in decisions involving quite unrelated questions, that could far better be summed up in simple, direct statements by the author. Again, it is unfortunate that the book is marred by a tendency to lay down broad propositions, which, though apparently simple, are essentially confusing, since sometimes they fail to be borne out by the material they characterize. A decision is not "good law because the justices said so;" it is not a general principle that "a state may take private property for a private use without compensation if it serves a public use;" nor is it true that "the Supreme Court . . . ruled that state policing measures which in effect deny to some persons the equal protection of the laws are not void:" to say so is particularly unfortunate in a book which is designed to be read by people who are not lawyers. Still, the book has secured the fundamental advantages of the case method; it has obtained the interest and virility that results from the consciousness of dealing with actual cases; it has obtained the clarity which arises from seeing not only the lifeless abstractions, but the principles of law in operation; and it gives that understanding of the growth and nature of non-statutory law that can only arise from a study of the cases by which that law is evolved.

Chicago.

ELLIOTT DUNLAP SMITH.

THE CONTROL OF STRIKES IN AMERICAN TRADE UNIONS. By George Milton Janes. Johns Hopkins University Studies in Historical and Political Science: Series XXXIV, No. 3. Baltimore: Johns Hopkins University Press. Pp. 131.

In this monograph Dr. Janes has traced the development of control over strikes in its various aspects by unions through their different governing agencies. The topics covered in the study are "The Development of Control," "Control by National Deputy," "Arbitration and Control," "The Initiation of Strikes," "The Independent Strike," "The Management of Strikes," "Strike Benefits," and "The Termination of Strikes." The author has shown a large amount of diligence in working over the trade-union literature on the subject, and familiarity with a wide range of union experience. The study is a very useful addition to the literature on the subject of trade-unionism.

However, the author could have made his study much more serviceable, if he had given more attention to casual relations, and the reasons why unions have developed in particular directions rather than to have confined his treatment to the extent that he does to the statement of the facts of this development. It is a much simpler task to state what has happened in union experience than to explain why it has happened thus. A comprehensive acquaintance with the facts is, of course, a necessary prerequisite for the scientific treatment of any subject; but unless the study proceeds to interpret these facts, it falls short of the best ideal of scientific investigation.

Failure to emphasize these casual relations has prevented Dr. Janes from presenting union attitude and experience at certain points in its true light. He directs attention to the control over strikes exercised by the Railroad Brotherhoods, and makes the statement that "after their local and general committees and national representatives have failed to bring about an adjustment of difficulties, usually appeal to the mediators designated in the Erdman (now Newland's) Act" is made,—a statement which conforms to the printed rules of these unions and which in general is true. But circumstances have arisen at the present time which have caused the Brotherhoods to change their attitude toward mediation and arbitration under the Newland's Act. The strategic economic position of the Brotherhoods has made them for the time being more self-reliant. Consequently, they feel that more can be gained through direct negotiation and test of their economic strength than through arbitration. This change of front on the part of the Brotherhoods shows how union attitude and practice may depart from formal published rules. The action of trade unionists is governed in the main by what the members think will make for their economic advantage. Rules and regulations are formed to attain their purposes in an orderly way. But rules and regulations are static. Economic interests change as conditions in industry change. Thus arises the motive for a departure from established forms. Rules must be modified or practice will depart from rules,—a change



which is found even more frequently than an amendment of the rules. Failure to emphasize this phase of unionism has led Dr. Janes to present less than the complete case. Similar illustrations could be cited from the monograph, if space permitted.

Dr. Janes could have made his study more readable if he had worked out a better time scheme for presenting his information so that the facts given could have been more easily carried away. Throughout the monograph, in citing illustrations in support of points made, he seems to have followed the practice of drawing out of the notes he had collected all of the references that bore on the point under discussion, and of arranging these according to the date of occurrence. The result is that the experience of the Typographical Union in 1803 may be associated in the same paragraph with the action of the Flint Glass Workers in 1881 (cf. p. 76). My point is that sufficient attention has not been given to the most effective way that information drawn from different unions at different dates can be presented.

The monograph seems exceptionally free from error, which speaks well for the care of the author, especially when the range of trade-union literature covered is considered. However, on page 99 and at one or two other points, the author refers to the Amalgamated Wood Workers as if this organization was still in existence. The fact is that the amalgamation of this organization with the United Brotherhood of Carpenters was effected April 1, 1912. On the whole the study is very satisfactory and will doubtless be found to be very useful to students of trade-unionism.

Northwestern University.

F. S. DEIBLER.

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# ILLINOIS STATE BAR ASSOCIATION NOTES'

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## **WINTER MEETING**

The winter meeting of the State Bar Association was held in Springfield February 7. The board of governors held the first meeting commencing at 9:00 A. M., when it was determined to hold the annual meeting of 1917 on May 31 and June 1 and 2. When the subject of the place of meeting was brought up, Decatur and Danville presented invitations. After three ballots the vote remained a tie and it was decided to leave it to a mail vote, giving all members of the board the opportunity to vote.

The Practice Act, then pending before the legislature, was thoroughly discussed, and Edgar Bronson Tolman, Esq., was appointed to represent the board in arranging for the meeting with the Committee on Judicial Practice and Procedure of the House.

Visiting members spent the day either at the Capitol, where both Senate and House were in session, or at the meetings of the federation of local bar associations of the third district in the circuit court room. At 1:30 P. M. the executive committee of the state federation of local bar associations met in the secretary's office for the purpose of organization. This promises to be one of the very effective arms of the State Bar Association and especially when it desires to obtain quick action among the organized bar associations of the state.

At 6:30 P. M. the State Bar Association entertained the Supreme Court, the state executive officers and members of the legislature at a dinner at the Leland Hotel. Rarely has such a distinguished assemblage convened and never under the auspices of the State Association. Every member of the Supreme Court, the Governor, all state executive officers, and over one hundred members of the Senate and House accepted the invitations. The capacity of the banquet room was exceeded, and a program consistent with the occasion was enjoyed. Mr. Harry Yeazelle Mercer of Danville

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1. By R. Allan Stephens, Associate Editor of ILLINOIS LAW REVIEW and Secretary of Illinois State Bar Association.

gave a program of old songs during the dinner. President Albert D. Early of the State Bar Association acted as toast-master, and the speakers were unusually interesting and instructive. Hon. Frederick C. Tanner, who was a member of the constitutional convention of New York, described with peculiar interest its methods of operation, especially along the lines of consolidation of departments as is being attempted at the present time by our legislature. Governor Lowden spoke in the same vein; his subject being "Responsible and Efficient Government." Honorable John Barrett, Director-General of the Pan-American Union, had just returned from a trip along the firing lines of the great war. As an eye witness he described most vividly the scenes still fresh to his mind, and none of his listeners will ever forget his wonderful description of the Zeppelin night-raid on London and the destruction of a German superdreadnaught of the air. Several times Mr. Barrett tried to stop, but was compelled to continue by calls from his audience.

### DISTRICT MEETINGS

Like the revival meetings of old, the district meetings increased in size and enthusiasm as the season progressed and when the sixth district was called to order by President R. K. Welsh in the circuit court room at Freeport, the room was filled with representatives from almost every county in the district. Not only was a crowd present, but the effectiveness of this organization, which has been in existence for three years, was demonstrated when the secretary called attention to several bills which had been submitted by the members of the legislature from that district for the opinion of the federation, with the assurance that such members of the legislature would be glad to be governed by the wishes of the lawyers back home, as expressed through the federation.

The increased interest in these meetings was also demonstrated in the greater number of propositions presented for consideration. The first district meeting, held by the State Bar Association at East St. Louis last November, had only three or four questions for discussion; but at each district meeting more problems were contributed until it was found in the sixth and third district meetings that the time was too short to consider all of them. The proposed bill providing for sales of real estate after the equity of redemption period had run, was approved as far as the principle was concerned, by all the district meetings, as was also the bill prohibiting corporations from assuming to practice law. Amendments to the Practice Act did not receive as consistent approval, although the proposition to make a summons returnable on a fixed day before the following term, did meet with unanimous approval. The sixth district being a border district the lawyers were in favor of amending the Administration Act to permit non-resident heirs to nominate administrators.

The following officers were elected for the ensuing year: president, R. R. Tiffany of Freeport; secretary, Wm. J. Fulton of Syc-

amore; treasurer, W. J. Emerson of Oregon; and R. K. Welsh of Rockford as member of state executive committee.

The last of the district meetings was held in the third district at Springfield, February 7. Twelve of the fifteen counties of the district sent delegates and the meeting was held in the circuit court room commencing at 10:30 A. M. At the Vandalia meeting a resolution was proposed urging the lawyers of the state to get behind the movement to abolish the rule in Shelley's case. Such proposition was proposed at each of the following district meetings and met with the approval of the bar associations of the seventh, second, fifth, fourth and sixth districts. But alas, when the resolution was presented at the Springfield meeting it seemed that our old friend, the rule in Shelley's case, still had some support, and after a number of sarcastic speeches, the resolution was defeated, as was likewise the proposition calling for a law to prevent the destruction of contingent remainders.

The Springfield meeting was fortunate in having in attendance Prof. H. W. Ballantine, Dean of the Law School of the University of Illinois, and Honorable James M. Riggs of Winchester, the latter being one of the original members of the Illinois State Bar Association. Both gave interesting addresses.

For the coming year the following officers will be in charge of affairs: President, James Reilly of Springfield; vice-president, E. E. Donnelly of Bloomington; secretary-treasurer, R. Allan Stephens of Danville; and James S. Baldwin of Decatur as member of the state executive committee. The next annual meeting of the federation will be held in Bloomington.

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## LEGAL CLINICS AND BETTER TRAINED LAWYERS—A NECESSITY<sup>1</sup>

BY WILLIAM V. ROWE

A preliminary word as to plan and scope is perhaps called for. We are suggesting a sound idea, presented from the right point of view, but the success of its practical development in a law school will depend absolutely on the existence of genuine enthusiasm on the part of both faculty and students. Without enthusiastic belief in and devotion to the idea, the effort to work out satisfactory results will not be worth while. That enthusiasm will, in turn, depend in large measure on a comprehensive knowledge and grasp of existing conditions and a full appreciation of their significance and tendency.

As this memorandum has been prepared for the eye of the general professional reader as well as for that of the law school expert, it contains a fulness of introductory and explanatory detail which otherwise would have been unnecessary, and which the specialist may conveniently overlook. To the mind of the expert, the suggestion itself will carry conviction without illustrative or argumentative support. Training in a legal clinic is not a startling novelty. It has been in use for years at Copenhagen, and has recently been adopted, officially or unofficially, as the case may be, by the University of Minnesota, Northwestern, Harvard, Yale, Tennessee, George Washington, and perhaps elsewhere. In seeking to overcome possible conservatism in New York, where such a clinic is most needed, and in other communities, we are simply working in virgin soil which may require a little preparatory treatment.

In discussions of this nature bearing upon legal education, we must not for one moment overlook the fundamental and vital inter-

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1. A memorandum originally prepared (in 1914-15) primarily for Columbia University and New York State, but applicable generally, and now printed with a few changes. It is intended to supply merely the suggestions, chapter-headings and points for a full argument.

est and duty of the people themselves and their government, an interest and duty which are here directly involved, but which have heretofore, in this behalf, in the hurry and pressure of America's material and industrial affairs, been utterly forgotten and ignored. Primarily, this is all an affair of government, a matter of the gravest public opinion.

The administration of our constitutional system is necessarily placed in the hands of the lawyers of the country. Clearly, the welfare and efficiency of the system—the people's government—require that the people themselves, for their own protection, and through proper instrumentalities, shall supervise and regulate the education and training of these necessary public servants.

Our system is highly legalistic. Based as it is upon individual liberty and freedom of justice, all citizens are constantly forced into contact with the law in order to advance their liberty by an ascertainment and protection of individual legal rights, in other words, by seeking justice under law. In this process, lawyers are an absolutely essential element, but, for a majority of our people, the expense of the process, especially under the complicated conditions of modern life, is prohibitive. Hence, the righteous complaint that the liberty and rights of the mass of the people are now crushed and lost beneath the weight of the system. The remedy is plain. The public must, where necessary, bear these particular burdens of government. The people at large and their government must take over and organize the work of legal aid societies, not as a charity or social-service enterprise, but as a necessary and long-neglected governmental function. For those who cannot bear the burden of expense, legal advice and justice must be free. Otherwise, our boast of freedom, our whole system, indeed, becomes a mockery.

Then, too, this matter of public legal aid touches at a vital point the training of the modern lawyer. The radical changes in the conditions and methods of legal practice and professional office-work have now made the adequate provision for clinical training and experience the most essential part of legal education. This can be effectively supplied at the present time only through a compulsory association and co-operation between the law schools and the legal aid societies or public legal aid agencies. Public regulation, through our judicial establishments, for example, can be made to bring this about and to furnish the necessary financial resources and support.

The future welfare and natural development of our govern-

ment also demand that the public shall in like manner strictly supervise all preliminary or preparatory education. The great flood of foreign blood, much of it antagonistic by instinct, which is now sweeping into the bar, is wholly unfamiliar with English and American traditions and institutions and with the nature of the common law itself. It must be thoroughly trained in those subjects and in a knowledge of the English language. All such training lies at the root, is, indeed, the tap-root, of our governmental system. Our public supervision must be watchful, and must make impossible the existence of any laxity, or of any antagonistic or unpatriotic spirit or tendency in this matter.

The enforcement of uniform standards and requirements in all states must be brought about, in the only possible way, through the moral effect and compelling influence of the action on this subject of the Supreme Court of the United States, aided by the American Bar Association—in prescribing the qualifications for admission to the federal bar—or through other federal regulation and action.

With knowledge, to be furnished by our own experience and the forthcoming reports of the Carnegie Foundation, let us, with patriotic devotion, seek courage and, above all, *vision*, for the right solution of these extraordinary educational problems which today are affecting our whole national life and welfare.<sup>2</sup>

Notwithstanding, however, the exceptional interest and importance of these suggestions, we are now proceeding to deal with this general subject more narrowly, and only so far as it relates to such practical clinical training as may be possible under actual present-day conditions as we find them.

*We must never forget that lawyers will always be our governing class in America.* Fully *two-thirds* of our presidents and senators and *more than one-half* of our congressional representatives, and of the members of our state legislatures, have been, and probably always will be, lawyers, and, of course, our courts, with a few unimportant exceptions, are wholly recruited from members of the bar. In this condition there is nothing anomalous. On the contrary, as we have already intimated, it is the natural and necessary state of affairs in a common-law country, under a written constitution. Nevertheless, viewed in their relative proportions, these facts must give impressive importance to any consideration

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2. The reports of the Carnegie Foundation, on Law Schools and Legal Education and on Legal Aid work, will probably be completed by the winter of 1917-1918.

of the particular subject before us. They are facts, indeed, which, emphasized by the great *alien* element now crowding in upon the profession, become immediately decisive, and *distinctly fix the responsibility and measure the duty of the American law school*. We are quite justified in insisting that the maintenance and sound development of the Anglo-Saxon law of the land—upon which alone must rest all true liberty and social progress—are now plainly at stake. Here, truly, is our question of "*preparedness*" *with a new emphasis*. The year of Magna Charta has been a good time to think of these things.

Accepting also, as we must, the further fact that the preliminary or probationary practical training for the bar, through the familiar office studentship or clerkship, deemed so essential in all common-law countries, has been largely lacking with us for the last twenty years, and that what the law office has refused the law school has failed to supply, the question immediately presents itself, What are we now going to do about these matters? for do something we must, and quickly. Certainly the law schools can no longer, with ever-increasing complacency, fold their robes about them and withdraw from touch with living problems. In these times and in our common-law communities they are not any longer to be permitted to take themselves seriously as cloisters set apart merely for creating or embalming legal literature. They have, on the contrary, by a process of evolution, become *a great moral and political agency, affected with a public interest—the sole instrumentality for the nourishing of the spirit of the profession and for the right training of our great governing class, now so largely made up of foreign and untutored blood, which cannot otherwise be trained for necessary public service*.

Although no plan can be worked out off-hand and nothing can be accomplished in a minute, it is evident that, on this general subject, we have had enough of mere debate and that the time is now ripe for action.

At its January, 1916 meeting, for example, the New York State Bar Association, in creating a committee on legal education, on motion of the undersigned, adopted the following resolution, which tersely summarizes existing conditions and the questions which they present, while at the same time outlining the main headings under which this entire subject of legal education and qualifications for the bar must now be considered:

"*Resolved*, That the whole subject of legal education and of qualifications and examinations for the bar be referred to a special committee, to be



appointed by the President, the number of whose members shall be fixed by him, with instructions to consider and to report recommendations upon the subject, in the light of the work of the Carnegie Foundation for the Advancement of Teaching, of the largely increased proportion during this generation, among lawyers and in our general population, of the foreign element from the code countries of continental Europe, hostile to common-law institutions and traditions, and in the light of the changes during the past thirty years in general office business and professional work, and in the methods and facilities of practice, with special reference to the following matters:

"First—The special requirements in modern legal education and training and qualifications for the bar, in view of the fact that lawyers have always been and necessarily always must be the chief governing or administrative class in a common-law country under a written constitution.

"Second—The public supervision and regulation (preferably by constitutional provision, to avoid periodical legislative interference) of all legal education and training and of the qualifications for and admissions to the bar, to be worked out through a department or commission of legal education.

"Third—The promotion of standardization and uniformity throughout the United States, through possible influential and compelling action by the Supreme Court of the United States or otherwise.

"Fourth—The raising of standards to that of the college and law school degree, and the strict regulation of the admission to practice of lawyers from states with low standards.

Fifth—The requirement that, to meet changes in office practice and accommodation for students (who are now largely deprived of opportunities for developing the professional spirit prior to their admission), *every law school shall make earnest clinical work, through legal aid societies or other agencies, a part of its curriculum for its full course.*

"Sixth—The requirement of a four-year course in all law schools.

"Seventh—The granting of *preferential consideration*, in time required for study or clerkship, *to graduates of law schools, with clinical instruction*, over students prepared by other methods.

"Eighth—Nature and extent of the character examination on and before examination for the bar and during the period of study and clerkship."<sup>3</sup>

The Union League Club of New York, on like motion, in February, 1916, adopted a similar resolution.

Let us bear in mind, therefore, that we are, at the moment, considering a great and broad question of training rather than a comparatively incidental question of instruction in practice and procedure, and that we are laying our whole stress on the *training*, for it may be said at once that a knowledge of practice can be acquired *only by practicing*, and that it will be absorbed quickly and naturally as an incident and a result of right training. It is folly to waste

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3. 39 N. Y. State Bar Ass'n. Rep. (1916), pp. 242-250. Hon. Joseph H. Choate, Hon. Elihu Root, and Mr. Francis Lynde Stetson are serving on the Advisory Committee of the committee appointed under this resolution.

time in the effort to teach practice in the classroom in the customary manner—a folly almost as pronounced as the continued encouragement of “moot courts.” Indeed, practice, as such, cannot properly be made a separate subject or course. And, it may be added, the new short practice act and the voluminous rules, if adopted as now proposed in New York, will furnish no easy or royal road to its complete mastery.

In his extraordinarily able and comprehensive report to the Carnegie Foundation<sup>4</sup>, Professor Redlich takes occasion to say that no law schools can replace or supply

“those particular qualities which practice alone can give. No theoretical instruction in the law,” he insists, “whether in a country of codified law or in a country of common law, can do this.”

And, in referring to what is learned in a law office, he again says:<sup>5</sup>

“It must, of course, again be emphasized that this knowledge can never be gained in any school, anywhere, any more than any law school of Europe or America can teach the future lawyer the ethics of the legal profession, or the peculiar instinct (*takt*) of the successful lawyer or judge. In this calling, as in every other, only the direct atmosphere of daily professional life can furnish to the beginner certain experiences and qualities which are of great practical importance.”

This familiar idea of the clinic, to be adapted to the teaching of law, by bringing the law office, with this “direct atmosphere of daily professional life,” to the law school and the student, inasmuch as the student can no longer go to the law office—a plan apparently not brought to the attention of Dr. Redlich—is now seriously suggested for general adoption, with a view of filling this needless and dangerous gap in legal training.

A constant dallying, procrastination and muddling, in and about its own peculiar affairs, is the regrettable but acknowledged and characteristic record of the legal profession. Why it is, however, that we have for so many years lagged behind all other professions, and even the manufacturing and commercial industries of the country, in this matter of providing systematic and experienced clinical and practical instruction, all laymen and nearly all lawyers find it utterly impossible to understand. Medicine, surgery, the ministry, the arts, architecture, and engineering have always supplied this preliminary practical, or clinical, school experience, and, finding the ordinary and vocational schools often

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4. “The Common Law and the Case Method in American University Law Schools,” p. 38.

5. *Idem*, p. 40.

lacking in right training for their work, even the various manufacturing and business organizations have developed their own classes for clinical instruction. University graduate courses in "business" and in commercial activities, with outside clinical apprenticeships in business-houses, are also being established. Indeed, municipal departments have sometimes organized such schools. Nevertheless, for our delay and conservatism there is really some excuse, inasmuch as we did, in our offices, until twenty years ago, furnish to students opportunities for what was made to serve the purpose of clinical instruction. But how crude and unsystematic it all was, and how far behind the work of the other professions; and now even that is a thing of the past. *Students* are no longer welcomed in the best offices, especially in the cities, and few such opportunities exist for general preliminary practical work.

The general question of practical instructors and practical instruction was covered by Dean Stone's admirable and suggestive paper before the American Bar Association in 1911<sup>6</sup>, and the Section of Legal Education of that association, including the Conference of State Bar Examiners and Law School Teachers, debated at length at the 1914 meeting the whole subject of office-instruction and the training of students in practice. Particular reference should be made to the paper of Mr. Carson, of Philadelphia, and the address of Dean Vance of the University of Minnesota<sup>7</sup>.

At that meeting, however, too much attention was directed to the mere question of teaching "practice" by office work, or by active practitioners. That is not the right point to aim at. The real need, and especially is this true in New York, in Chicago, and in other large centers, is education, training and discipline in the conduct of professional life—the development of what may be called the professional character, spirit and *savoir faire*, in the only possible way, that is to say, by placing the student in a proper law office, which we will call *a clinic, under systematic instruction and training*, and in constant touch with reputable practitioners of high character, who, in a *general* practice, are applying the law in the concrete, as a living force, to the living problems of our people. The student thus *lives* in an atmosphere of the law, and absorbs the spirit of its practice, day by day, in the course of actual dealings between lawyer and client. As in the case of the Inns of Court and the English barristers' and solicitors' offices, the student un-

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6. 36 American Bar Association, 768.

7. 39 American Bar Association (1914), 887-900, 799-807.

consciously develops in such an atmosphere, under the influence and contact of character and personality working in the harness of the law, the trained professional conscience and practical sense—the instinct for right and the consciousness of wrong, which constitute the true spirit of the profession, and lead, regardless of rewards, to that necessary self-sacrificing devotion to the vindication of the good and the true and the punishment of the evil and the false, upon which, with us, must largely rest the welfare of our profession and much of our advancement in social development and organized government. This is the spirit of the real law office which the law schools must now supply. In learning in this way *how* to practice and how to deal with clients, as the principal thing, the student learns technical practice and procedure as the machinery and a mere incident of his work. Knowledge of practice cannot be acquired by any other method.

In all this there is no false sentimentality. It is all serious matter of fact and sober common sense. The profession at large, the judges, and the bar examiners will have to wake up to the real situation, and they and the law schools will have to perform their full duty. Throughout the country, on this question of legal education and qualifications for the bar, there has been too much dallying due to politics, to a laissez-faire spirit, and to an imaginary or assumed public opinion as to everybody's right to practice law. Although this matter of legal training lies at the root of all government in America, the fact is, there is no public knowledge or sentiment whatever on the subject. Of course, there ought to be and will be, and, when it does appear, public opinion will be overwhelmingly in favor of the strictest training and standards. The cheap lawyer-politician will be swept off his feet. He now talks glibly about Abraham Lincoln and equal rights for all at the bar, forgetting that, with modern educational facilities, all our real Abraham Lincolns are in these days college-bred men. Clearly, in view of the existing confusion among the states and of the low standards, we must, as soon as may be, have standardization of qualifications for admission, and higher educational standards, both preparatory and professional (preferably both a college and law school degree), with a broader and better training, and a consequent desirable reduction in the number of lawyers. There must be a stricter character examination, both before entrance upon a clerkship or law school course and before admission to the bar, with paid investigators regularly employed. No

candidate should be permitted to make more than two trials of the examinations for the bar. Nothing, however, can be accomplished unless (by constitutional amendments, if need be) we first destroy the possibility of constant irresponsible and ignorant legislative tinkering, and establish an expert supervisory educational body which shall regulate all legal education and qualifications for the bar. Then we must secure standardization and uniformity, in the only practical way, with the aid, possibly, of the Supreme Court of the United States, through the creation of such a *federal* supervisory body, which shall fix the highest standards, and shall control the qualifications for and admissions to the *federal* bar. The states will thereupon be obliged to fall in line. We have no time further to discuss these measures now, but every lawyer worth his salt knows that we must come to them or to something equivalent to them. We must promptly get out of the ruts of our fixed routine, for it no longer meets and satisfies the needs and conditions of the hour. The legal clinic will be our first step.

Each community, however, must adapt itself and its remedial methods to its own peculiar problems and surroundings. Many of us have been sorely distressed by some of the conditions in The City of New York—conditions common to all our large cities—and have been considering our particular problems for many years. The story is not new. Nevertheless, it is clear that it is not generally realized how completely our practice has changed in the last twenty years and how radically the changes have shortened the vision and limited the experience and opportunities of the bar at large, and, as a consequence, of the growing body of students—limitations which have emphasized in vast measure the commanding necessity for the broadened and extended law school instruction here advocated.

In all our large communities, litigation in the better class of law offices has almost ceased, or has sunk into comparative insignificance as an element of practice. Our former advocates and barristers have become chiefly solicitors and the desk work of the solicitor—the direct advisory guidance of business and the settling of controversies—has completely supplanted the work of the litigating office. Corporations and corporation law, and business, now dominate our practice. It is a permanent tendency. Intense specializing has resulted. There is no general practice in real estate law, and comparatively little in that of wills, trust estates and shipping. Since the late '80's and early '90's, corporation and business reor-

ganizations and consolidations, the dominance of business, with its insolvency and bankruptcy problems, and the change from sailing-ships to steamships have thus revolutionized our work. There has been a constant falling off in all important classes of litigation, with an almost total loss of the substantial and useful old-fashioned commercial and admiralty litigation, involving shipping, insurance, commercial contracts, sales, bills and notes, and general business transactions, any residue of which now goes to boards and committees of arbitration on the exchanges. Those committees, with the trust companies, title companies, and companies for organizing and caring for the routine legal affairs of corporations, have destroyed the real estate practice (of inestimable value to students), and a large part of the practice arising from wills, decedents' estates, trust estates, corporation routine and general business. And even the tort litigation, much of it of little practical value, is being rapidly swept away by the Workmen's Compensation Laws and other modern social and regulatory legislation.

We are, perhaps, too near these changing conditions to find a true perspective, or to formulate a final judgment as to the future and as to the full needs of the profession and the schools to meet the changed requirements of our communities. We do know, however, that the American lawyer must forever remain an all-round lawyer, a full-fledged, fully-equipped barrister as well as a solicitor, completely prepared and able to deal directly with the people concerning all of their affairs. No lawyer is qualified to advise in relation to controversies and their adjustment, or in relation to the general transactions of business, unless he has had ample experience in general litigation. Nothing can take the place of such experience. It is also true that experience in real property and general commercial and admiralty law is almost as essential to his equipment. With the loss of such experience, what will this and the next generation of lawyers amount to, and what will be the effect on the development of the law itself? What functions must the law schools assume in that behalf?

The general introduction, since 1880, of telephones, stenographers, typewriters, dictating and copying devices, and improvements in printing, in connection with these changes in practice already noted, has made *students* not only unnecessary but actually undesirable in most of the active law offices. Plainly speaking, they are considered to be a nuisance. The fully-qualified lawyer,

able to participate in the responsible conduct of business and to meet clients, is alone needed and sought for. As a result, the student or junior clerk has lost the former ample opportunities, when preparing cases, or aiding in court, or when acting as messenger from one office to another, for those invaluable personal contacts and conferences with older men and leaders at the bar which always served as the most stimulating and important elements in the training of a lawyer. Add to that the further loss involved in the relief of the student from the task of copying papers coming from the hands of master-draughtsmen in the profession, from which service came a large part of the most useful training, and we begin to realize the heavy handicap of the new generations of lawyers. These various tasks of the student meant constant service in the best legal atmosphere, and showed to him, from hour to hour, the law and lawyers, in action as living forces. His principles and standards of conduct were learned and absorbed unconsciously.

One of the worst results of these changes is the almost total loss of general contact and acquaintanceship at the bar, even among lawyers themselves—a most essential element for the preservation of professional solidarity and the maintenance of the true professional spirit and standards. Lawyers no longer know the members of their own profession, and students, as already pointed out, are deprived of nearly all opportunities for beneficent and instructive intercourse with the members of that bar to which they are about to be called. Acquaintance and fellowship are largely limited to college-mates, to associates in clubs and societies, and to the particular home and office associates—an extremely narrow circle naturally leading to the development of cliques.

These conditions, generally familiar, are still further aggravated for us in The City of New York and in other large cities by the character of our population—and the permanent modern drift of population and of lawyers into our cities should constantly be taken into account.

In the continental United States, according to the last census, there were 114,704 lawyers, or one for every 802 of the population. In the City of New York, there were 10,563, or (omitting the few women lawyers) one for every 606. *Over fifteen per cent* (1,693) of the male lawyers were *foreign born* and *over fifty per cent* (5,506) were either *foreign born or of foreign or mixed par-*

*entage*. This general condition prevails in all our large cities, but, with us in New York, at the country's gateway, it is specially burdensome.<sup>8</sup> Among this foreign stock we find some of our best scholarship and our most thirsty seekers for knowledge and light and material progress—a thirst, however, which, only too frequently, has slight relation to those qualities having to do with morals and character. With due regard for the common good, we feel a keen and sympathetic interest in the free development and in the general welfare of these people, because, with proper education as to the moral, social and legal significance of our institutions, based on the obligation of all to serve all for the benefit of all, they will, as the generations come and go and the races mix with one another more and more, become one of our most valuable assets. But sound and persistent training they must have, and that, constantly. As it is, they are now, although wholly untrained, receiving and accepting in crowds the full responsibilities of American citizenship. There lies the danger, especially as there is great racial segregation and solidarity and even continuous lack of any adequate knowledge of our language.

As an affair of the present day, therefore, our problem thus becomes a peculiar and difficult one. This foreign element is now largely of the blood of southern, eastern and central Europe—people whom we are beginning to meet, in a way to attract our attention, on our streets, in business, in politics and in the professions. With brilliant exceptions, they have few traditions (speaking generally) except the objectionable ones of a down-trodden subject-race, in constant war with oppressive power and authority, the defeat of whose purposes, from day to day, has, in the past, been deemed by them both praiseworthy and justifiable. By inheritance more or less hostile to all authority, and with little inherited sense of fairness, justice and honor as we understand them, the earnest striving for knowledge of many of these people is centered mainly upon their own selfish advancement, in a material way, under the “New Freedom,” which for them frequently means license. So much for their inherited character and point of view. Of equally disturbing import, however, is the fact that their legal traditions, such as they have, all rest upon a Continental “ready-made” code or system of law, handed down by authority, and that they have no inherited conception of, or

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8. See a useful compilation of statistics in the West Publishing Company's “Docket” for March, 1915, at p. (1348).



capacity to understand, the common law, as the people's law—a law developing from special instances in the life of the people, and growing as a living thing with the unfolding of that life. What are we to do in the law schools with this special problem? How are we to preserve our Anglo-Saxon law of the land under such conditions? This is the stock from which our untrained lawyer-politicians will be drawn, and are, in a measure, now being drawn, to flood our legislatures. Without necessary knowledge or training or correct instincts, without any inherited sympathy with, or understanding of, our institutions, and, indeed, frequently with inborn hostility to all law and order, they will have the votes and the power (and to a large extent have them already) to tinker irresponsibly, not only with our practice and procedure and the qualifications for the bar itself (witness, Massachusetts' recent experience),<sup>9</sup> but also with the most vital portions of our substantive law, and even with our fundamental constitutional provisions.

The increasing confusion and uncertainty of motion in our streets and public places, when not under police regulation, is typical of the confusion which may be wrought in our institutions. For the first time, recently, it has become necessary in many large communities to emphasize, by prominent notices, the American rule, "Keep to the right." More than half the population, because of their inborn contrary instincts and traditions and our own indifference or lack of adequate facilities for properly training them otherwise, now insist on keeping to the *left*—a most significant departure.

In the solution of this problem, created by the presence among us of the first and second generations of this foreign blood from the new immigration of the last twenty years, which, in its special and growing relation to the future welfare of our bar and of our whole governmental system, now wears a new aspect when considered from the standpoint of preparatory and professional education, we must arouse a fresh and keener patriotic interest among members of our bar. The spirit of routine indifference and of in-

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9. See *In re Bergeron*, 220 Mass. 472 (Mass. Supreme Judicial Court, March 4, 1915). Also, Mass. Act of May 11, 1915, entitled "An Act Relative to Admission to the Bar of Attorneys-at-Law," reducing the general educational qualifications for the bar to a *two-years' evening high school standard*—the result of a movement, covering over *five years of agitation for lower standards*, strongly promoted by Mr. Martin M. Lomasney, an influential ward leader of Boston, because, as he expressed himself in a letter to the bar examiners, January 12, 1915, such a measure or rule was calculated to maintain "*a proper standard and give every applicant an equal chance*"!

grained selfishness among members of the bar must be strangled. It has become a question of duty and public welfare, to which, both as lawyers and as citizens, we are bound patriotically to devote ourselves. There must be high and uniform standards in the preparatory as well as in the law school curriculum, and the curriculum must be adjusted, with special emphasis and care, to the needs of this foreign element and of our own indifferent citizens. We must above all teach them what America means to Americans, and must open up to them the full significance of the common law and of our peculiar history and institutions. The preparatory course must, therefore, give great and exceptional prominence to the English language and literature, English and American history, government, institutions and constitutional law, and the general nature of the common law, with special reference to its relation to the life of the people and to its method of development in contradistinction to statutory and codified law. And, putting the stress on the same points, the law schools must give continuous importance to English and American constitutional law and institutions, and to the lives of great lawyers and the history and growth of the common law. All this is vital if our institutions and system of government are to be perpetuated. We must not delay, and must not relax our vigilance in this behalf for generations to come. Every teacher of the law must be a conscious and active patriot. Whatever his subject, he must keep constantly before him the vitally intimate relation between the teaching of law and the public interest, and, during every moment of his service, must breathe into his classes and consciously develop in them an active spirit of patriotism and great national pride. And this, for the reason that he is educating the future leaders of the people and the chief administrators of all departments of their government. Our common law, the only system under which liberty and justice and the life of the people can have normal development, must, therefore, be taught as a part of the national and individual life—as a living thing, and not as a mere aggregation of dead letters and fixed formulas to be studied and memorized at pleasure. The teacher must be spiritually alive and must put patriotic life into his teaching, and the spirit of patriotism and nationality must be made to brood over the whole process of legal education.

We may assume that New York and Chicago, for example, as the greatest cities in the western world and the greatest cosmopolitan centers, both actually and potentially, will naturally be the

homes of the greatest universities of our times, and, above all, of the most important schools of law, schools not necessarily like other similar institutions, but designed, rather, to satisfy these special needs of our extraordinary aggregation of races and individuals. Due to these existing conditions, creating something in the nature of an emergency, the chief immediate duty, after attending to the superlatively important matter of preparatory education, is to develop for law students the same comprehensive and exceptional clinical opportunities which have for years been open to medical students, to the end that the training of our lawyers and governing class, in legal traditions and culture and in the conduct of professional life, may, after an interruption of nearly twenty years in the opportunities for general office experience, once more proceed along right lines, under modernized systematic instruction and supervision. This will be a true public-welfare service.

Little can be accomplished, however, without the hearty co-operation and interest of the students themselves, the third year men in particular. Great pains must be taken to excite their interest in the work. To that end, it must clearly appear to be to their advantage. They must be made to see that the instruction will be so much greater in amount, because of its singleness of purpose and its systematic and warmly interested and sympathetic nature, and the knowledge and training so much broader and deeper and so much more vital, that there can really be no comparison between such a genuine clinical course and the doubtful, uninteresting status and opportunities of a student or junior clerk in an ordinary law office of the present day.

Then, too (and it may be said that there is reason for speaking with confidence on this point), the courts and bar examiners will readily *accept such a course as the full equivalent of, and a complete substitute for, the clerkship now prescribed by the rules governing admission to the bar*, because it will be, in effect, post-graduate work, and will obviously produce infinitely better results than such a clerkship.<sup>10</sup> That fact alone will settle the matter in the mind of the average student, and will lead to his acceptance of the course and his full support of the clinic.

Next, the clinic may, at pleasure, be made to cover practically the whole proposed *fourth year* now under debate, for, as we have seen, it can also be made the year of clerkship, so that nothing will

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10. See, for example, the propositions on this general head in 39 American Bar Association Rep. (1914) at pp. 822, 825-827.

be lost and much will be gained in students' time. Of course, it *can* be worked into the third year, if no fourth year be provided. To that end, much time can be saved by abandoning the profitless, wasteful and dreary "moot court" work, and by arranging *evening* hours (a most important suggestion) for a part of the clinic, especially, as in Copenhagen, in connection with the legal aid work to which we are about to refer. Naturally, however, we should like to see the clinic made the basis and reason for the immediate establishment of the fourth year.

Possibly, also, the students' time may and will be saved by adopting the familiar suggestion to shorten the college course, and by transferring the whole, or a part, of such courses (if now given) as those on Constitutional Law, Constitutional History, Government, International Law, Natural Law and similar subjects to the college course itself. So, too, courses which, due to permanent and fundamental changes in our law and practice, have ceased to be of much practical use to the average student, and have acquired rather an historical and literary flavor, may be greatly shortened.

The clinic can also be made the medium for what Professor Redlich terms<sup>11</sup> "a certain general summing-up and survey of the law." This would cover all the practical and useful courses of the preceding three years, and could, perhaps, be more readily and satisfactorily developed by the professor in charge of the clinic, as a part of clinical "demonstrations," than in any other way. That would, however, be quite apart from any additional course in general "Jurisprudence."

Better than all these suggestions, however, is the thought that, like the anatomical or surgical clinic, the work in the legal clinic should be made a part of the regular curriculum, in increasing degree, *during all four years, or certainly during the second, third and fourth years*. It should be made a part of practically the whole school life of the student. Nothing else is so likely to arouse an abiding interest in the law, as a vital thing, whether viewed as a whole or topic by topic. The use of *evening hours* and the sacrifice of comparatively useless subjects will make possible this extension of the clinical courses. *One year of the clinic is not enough*. Indeed, eventually, the clinic may be made *a principal medium of instruction in all years for all subjects*. That will be the natural and logical development.

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11. P. 45.

Each clinic case may be taken by the student to the classroom of the professor dealing with the subject under which the case logically falls. The clinic thus becomes a "case book"—not, however, of dead letters descriptive of past controversies, but always of living issues in the throbbing life of the day, the life the student is now living.

Like a surgical or medical clinic, but in much greater degree, this clinical course will mean earnest, red-blooded talks and "demonstrations," in a classroom, with close analytical arguments between lawyer and student, concerning the concrete living cases actually being handled by the students from day to day. Let the imagination play over the extraordinary opportunities thus presented for the best and most useful work. Later on, we shall again comment on this procedure.

For such a clinic we shall need large office organizations, with a very general practice, and with no restrictions upon the kind, value, or amount of business, provided, always, it be honest and meritorious.

In that behalf, we must always keep before us the fact that it will be the purpose of the clinic, not merely to educate in practice and to develop, in general, the true professional spirit, but, in the interest of the commonwealth and of good citizenship, to lay the foundations in the individual student for sound personal character and business honor, to make clear, in the concrete, the lawyer's duty to society and to his fellow-men, and, in so doing, to combat the idea, prevalent for two generations past, that the law is simply one means, like any trade, of making a living, and is freely open to the world without serious restrictions as to qualifications, and with no special resulting social obligations. Among other things, the student must understand the lawyer's duty, like the doctor's, to give his best service to the poor—to a non-paying clientage. In short, it must be made possible for the student to absorb and acquire from this clinical experience correct standards as to business honor, civic duty, charity and social service.

In looking about us for ways and means to satisfy these clinical needs, our first thoughts naturally turn to *the established legal aid work*. Through the earnest service and self-sacrificing interest of Mr. Arthur von Briesen, of New York, whose great abilities and warm-hearted benevolence have, as we all know, literally been showered upon that work for many years, it was long since made known to us that actual experience had demonstrated the prac-

ticability of this sort of clinical co-operation and instruction. Apparently, the first clinic of this kind to be organized was that at Copenhagen, visited by Mr. von Briesen as long ago as 1907—an institution managed by the Copenhagen Legal Aid Society jointly with the University of Copenhagen. This clinic is partly supported by public funds, and is conducted by the foremost lawyers and judges of the community, seven lawyers and one judge serving each evening, different individuals volunteering on different evenings, assisted in all cases by the law students of the university. This service of *students* and the *evening sessions* are the striking facts.

In his report of his visit, Mr. von Briesen says:<sup>12</sup>

"The official name of the society is 'Studentersamfundets Retshjaelp for Ubemidlede,' which, translated, means substantially, 'The Students' Association for Securing Legal Aid to the Poor,' the fact being that the society sprang from the University Law School, the body which supplies the students and the graduates for performing the most important work. The confidence which these gentlemen receive at the hands of applicants is naturally very great; their decisions are taken without a murmur, and terminate what otherwise might become much needless controversy. The influence for good thus exercised cannot be overestimated.

"So far as our New York Legal Aid Society is concerned, the principal lessons to be drawn from the excellent work done at Copenhagen are:

"(1) *That evening sessions are of extreme value*, because they enable the working people to present their cases during their hours of leisure, and also because they would permit some of our best-known lawyers and *our law students to assist in advising and analysing the cases* brought to their attention.

"(2) *The advisability of having our law schools officially interested in our work. Nothing can equal in importance the value to a law student of actual contact with litigants and their skilled advisers such as the office of the Legal Aid Society furnishes.* There are no 'moot' cases in these offices, and there is a great variety of questions, some of considerable intricacy, the solution of which will be *of more value to the students* even than to the party who deems himself aggrieved."

These suggestions naturally upset our equanimity still further and show us that as a profession we have been surprisingly negligent in systematizing our law-school methods of instruction, for, clearly, the law schools themselves are bound to aid and encourage the development of legal aid work, not merely as a necessary means for clinical instruction, but also, more particularly, because, under our extraordinary *legalistic system of government*—a matter to which we referred briefly at the outset—that work is really an essential part of our legal system, with which the student should

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12. 5 Legal Aid Review 26 (1907).

be made familiar. Under that system every citizen must resort to the law and lawyers constantly for the ascertainment and protection of his legal rights—an extremely costly process—and, that being the burden which the system itself casts upon the citizen, it is clear that the government or society in general, in protecting the rights of all, is under obligation to furnish the means whereby that protection can be secured in all cases where the citizen is himself unable to bear the expense of employing a lawyer. Otherwise, we might be forced to admit that our system, from its nature, really deprives a portion of the community of their legal rights—and that would never do, and would be contrary to the fact. Therefore, the public have devised legal aid societies, which are now thriving as charitable agencies even in code countries. With us, however, although heretofore undertaken as a charity, such legal aid work, as we have seen, is really the public's affair and should properly be operated and supported only by the government as an *integral element of our legal system*. We are now only in the midst of the early stages of this work. It should not be regarded as in any proper sense a charity, and will doubtless, eventually, be taken over by the public through departments of education, the courts, or otherwise. It is, nevertheless, so clearly a part of our system and so intimately related to legal educational work—like the hospitals, for example, in their relation to the medical schools—that, with all other channels for broad and general clinical work now practically closed to the student, the law schools are bound at this time to co-operate in the support and full development of all legal aid agencies. Harvard, Yale, Northwestern and Minnesota, and one or two others, as we have pointed out, have already in effect recognized this obligation. The bar associations may help in many ways, but the real educational alliance must always be between the law schools and the legal aid agencies.

In 1913-14, the University of Minnesota made a happy experiment with such a clinic—so far as known, the first in this country. In his luminous and interesting report upon its successful operation, however, Dean Vance, to whom all credit is due, seems to indicate<sup>13</sup> that it is devoted primarily to the teaching of *practice* (but, in effect, it accomplishes more than that, as we shall see), and states<sup>14</sup> that it is limited to charitable "Legal Aid Bureau" work and to cases not involving over \$100—the cases, in fact, seldom exceeding

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13. 39 American Bar Association Rep. (1914), 801 *et seq.*

14. *Idem*, pp. 804 and 806.

\$50 in amount involved—with the object, apparently, of not competing with lawyers in regular practice. That means mere justice of the peace work, and will not satisfy the needs of our larger communities. He does not refer to any classroom work based on that in the clinic. For the purposes of that clinic, a local legal aid bureau was organized in Minneapolis, and the competent young lawyer placed in charge of the office, with an assistant, was then made an instructor in practice in the law school. Ample practice was secured at once, a down-town office was opened, students of the third year, about sixty in number, were, in accordance with a posted calendar or schedule, sent there in "squad of four" for one week at a time, serving from one to six o'clock each afternoon, and great enthusiasm and successful results have followed, each student coming to the bar, as Professor Vance declares, "*not only a better lawyer, but a better citizen.*" That is to say, the clinic necessarily trains in character as well as in practice. This clinic is still proceeding "promisingly." It results in each student's securing from two to three weeks of clinical work during the year, in addition to the time spent in completing particular proceedings which have been started and not finished during the prescribed period. Such a clinical experience must and will be greatly enlarged for all purposes in congested centers like New York or Chicago. It clearly shows, however, the need of the fourth year—in which Dean Vance, like Dean Wigmore, who has now actually established the fourth year at Northwestern, thoroughly believes. All honor to them for this advanced work. This greatly adds to the obligations of a profession already deeply indebted to Dean Wigmore.

For *our* clinic, then, we must have an unlimited general practice, and must practice in earnest. There will be no objectionable competition with the profession at large, because the clinic will be a regular law office (and not the university itself in disguise), and will charge full fees for all its work, except the purely legal aid and charity cases. The corporation (the university) will not be open to the charge of practicing law, because its work will be wholly educational and benevolent, and the practicing will be solely in the hands of a regular and responsible law office having merely its own relations with the university.

The uptown location, which is not unusual, and the size of the classes, of the modern law school are not disturbing factors. Business and residences are also moving uptown, and the subways and other transportation conveniences will make communication with the



courts, clients, witnesses, and others sufficiently easy and agreeable. To provide clinical work for large classes is simply an ordinary problem of administration. Our primary needs will be two—first, an adequate *plant*, including a classroom and large law-office space, with proper equipment; second, *business*, of the most varied and general character and in large amount. The classes will then take care of themselves in the clinic. The universities, as a financial and physical proposition, can presumably find the necessary room, and there are ways of finding and developing the business.

A large classroom will be needed, separate and apart from the office suite and space, because the clinical instruction must, as we have said, necessarily include general classroom work, with "*demonstrations*" of *current clinical problems*, as well as individual instruction and guidance in each case in hand. This daily "*demonstration*," or *case analysis and debate in the classroom, of the problems of the clinic* will take the place, for the benefit of the whole class, of the method employed at Copenhagen, where one of the city's judges serves as a "Chief of Bureau," to whom are referred every evening for decision, after argument by the lawyers in attendance, all doubtful questions presented by the members of the clinical staff. As Mr. von Briesen describes the procedure:

"On specially difficult questions, several of the lawyers argue pro and con before the chief, who then renders the final decision.<sup>15</sup>

Naturally, however, the system may so organize itself, as we have shown, that the clinic cases may be divided by subjects, as far as practicable, the student taking his case into the classroom of the professor dealing with the particular subject in hand. *The friction of minds in the analytical and "demonstration" work of the classroom, presided over by the clinical director or the professor in charge, will not only naturally accomplish better results than those secured at Copenhagen, but will have the additional advantage of furnishing to the students the opportunity to participate in the argument of each case or question. Nothing could be better. There will be no "moot" work. All the business will consist of living problems and live issues.* In the Minnesota clinic, there is a responsible supervisory committee to consider problems as they arise and to advise the attorney in charge.

For our purpose, we should secure such a general and unlimited practice *at the very outset*, in order to meet the immediate needs of a large class in the clinic at the moment of its opening. We cannot wait for a practice to grow and develop, because the

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15. 5 Legal Aid Review 27 (1907).

clinic must be a success from the start. Students must have at once better opportunities and more general work than they could possibly secure in the ordinary office. Discouragements and lack of facilities at the beginning might dampen the enthusiasm of students and seriously injure the project in reputation and in their estimation. First impressions are of the utmost importance.

To this end, we must appeal, in each community, to such associations as The Legal Aid Society, the Educational Alliance, the Y. M. C. A., the Y. W. C. A., and the other benevolent and charitable and civic agencies, and must seek their earnest co-operation, with a view to securing for the clinic a very large proportion, if not the whole, of their legal aid work. Proper arrangements, financial and otherwise, as to office space, staff, etc., can readily be made, and it may be said, in particular, that there is no reason to doubt (it might be stated even more strongly) the sympathetic consideration of the matter by each Legal Aid Society. In fact, it is clear that, in New York, Mr. von Briesen, the former devoted president of the society for twenty-five years, has long been prepared to welcome, as an important part of what he deems the society's work, the right kind of interest and participation by law school students, in connection with a proper official interest on the part of the law schools themselves.<sup>16</sup> Such a welcome of students would be based not merely on a desire to furnish them clinical experience, but also on the expectation that intimate contact with the cases and the sufferings of poor clients would be of infinite service in the development along right lines of personal character and the professional spirit. This assumes, however—what would doubtless be forthcoming—a genuine interest by the students as distinguished from the indifferent or purely perfunctory performance of mere duties required by a law school curriculum.

In New York, for instance, the professional work of The Legal Aid Society alone, especially if we include several of its offices, would give us immediately a very large and general assortment of cases, probably sufficient for all the pressing needs of the clinic. Students could easily be distributed among different offices. The society had the cases of over 40,000 clients in 1914, over 2,200 of which went into the courts.<sup>17</sup> The work of the society is capable of almost indefinite extension. It is not supplying half the needs

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16. 5 Legal Aid Review 26-27.

17. Report of the Legal Aid Society of New York for 1914, pp. 7, 49-50, 52-53.

and demands of the community, owing to a regrettable lack of funds.

If, however, for any reason, The Legal Aid Society work and co-operation cannot be secured, an independent legal aid clinic must be built up with the assistance of the other charitable and public institutions, clubs and civic agencies, because, for reasons already stated, such work will furnish some of the best possible training. It is fair to assume that those students, even, who expect at once to lavish their splendid abilities and inexperience on corporation consolidations and reorganizations and on will contests involving millions, will have the good sense keenly to appreciate the value of the training, as such, and that even they will not slur such work as trivial.

The offices of the City Counsel and the District Attorney may also be drawn upon for work and clinical opportunities.

Then, also, for additional opportunities, we must, if it be practicable, establish relations with some prominent down-town office, preferably one already having sympathetic ties with the school, which can be induced to transfer a part of its business and staff, perhaps the whole, to an office to be devoted to the purposes of the clinic and as a nucleus for other business which will be attracted to the clinic's office. The location of the office, from the standpoint of the clinic, is unimportant, except as a matter of expense, and it may be at the university itself, or at any other point, whether uptown or downtown, or the office may be divided between any two or more locations, as required by the controlling necessities of business and by other considerations. The prestige of the university will command serious consideration for this extraordinary proposition, which will also involve the securing of some part of the services of one or more partners and associates in such an office for the work of the clinic. The connection with such an office and its business is desirable, not merely in order to give added practical importance and solidity to the work of the clinic, and to make it, on that account, more generally inviting and interesting to students, but also for the purpose of furnishing the basis and facilities, already referred to, for the new paying business that will naturally come to the clinic's office.

If it is found to be impracticable for the school to establish such a connection with a down-town office (and perhaps whether it be established or not), the effort should be made (in addition to the legal aid work) to place clinic students in large numbers, during

defined hours, in certain selected offices down-town, those of alumni to be preferred. Possibly, this would involve special financial arrangements to cover any necessary increase in clerical assistance and in office space for a "Students' Room," and also arrangements by which the work or cases assigned to students might become a part of the work of the clinic and subject to debate in the classroom. The clinic, its staff and students, would, in effect, become "of counsel." The support of the alumni will quickly open the doors of the necessary offices.

Arrangements should be made with the partners and managing clerks of the offices receiving clinic students for special attention and instruction to such students, even on the part of the partners themselves, and they and other managing clerks from the better offices, whose services may be enlisted, may also be called upon to serve in the general work of the clinic.

*Evening sessions* of the clinic, not only for legal aid work, but also for its general business, with the collaboration of some of the selected managing clerks and of some of the older members of the bar, may be arranged.

All open questions and all conflicts of opinion will be settled in the classroom, with such outside supervisory aid as circumstances may demand, or, if requiring immediate attention, will be determined by the professor or other person for the time being in charge of the clinic, with a possible subsequent review in the classroom.

The distribution and assignments of the students, and the adjustment of time-schedules and periods, of the compensation, if any, to be paid for services to the clinic, and also of students' special fees, if any, for the clinical course—akin to the fees paid by students in England to barristers and solicitors, and supposed to cover special instruction—are all incidental, routine questions.

There should be a director of the clinic, or professor in general charge, with such assistants and supervisory committees as may be needed. He must be a general practitioner of large and varied experience, including modern business law as well as the older and more or less discarded branches, and a person fully prepared to devote himself permanently to the work, who can, with his assistants, agreeably to all concerned, associate himself, if necessary for temporary purposes, as counsel or otherwise, with any lawyer whose office or business may become connected with the clinic.

The courageous pioneering experience of Dean Vance and others has shown that, to guard against students' blunders, due to inexperience, and to furnish proper instruction, those in charge of clinical work must be not only competent lawyers, who will permanently, and not simply as a stop-gap, devote themselves to the work, but also "good teachers with unusual tact and judgment." These natural demands of the clinic, as well as proper supervisory advice and direction, which he also finds necessary, will all be met and provided for by the general plan here outlined.

This clinic of ours will also aim to *do all the legal work of the school and university*, in all departments and branches, including all outlying activities. In other words, it will become *the general counsel of the university*. This will interest the students.

In consideration of that service, and of the clinical service and instruction to the law school, the university, under a suitable working and financial arrangement with The Legal Aid Society and with such down-town law firms as shall associate themselves with the university and the work as proposed, shall furnish, besides the professor or director in charge, and his assistants, the necessary floor space, equipment, and working force for the offices and classroom of the clinic, and such immediate working cash-capital as may be needed—for, after all, it must constantly be borne in mind that, while, like our medical friends, we are proposing to maintain accommodations for both general hospital work and private practice, with private patients, the clinic is, from the university standpoint, essentially and primarily a classroom of the school of law, destined, in its far-reaching opportunities and results, to be at least one of the most important in the school.

To aid the university in opening and maintaining the clinic, it may be desirable to raise a fund for "The Advancement and Support of Clinical Instruction in the Law." The financial burdens, however, may adjust themselves, very largely, inasmuch as proper fees will be charged for a part of the business of the clinic (especially for the ordinary paying business of the law office, as such), and the general financial arrangements, including those with any associated down-town firm, in consideration of the university's supplying, wholly or in part, the plant, equipment and working capital, will necessarily involve some eventual compensation, or rental return, to the university, measured by some proportionate amount of the fees collected. As the clinic prospers—as prosper it must, with anything like a fair amount of enthusiasm and sup-

port from its staff and from the students and alumni—this financial return, quite apart from students' fees, will prove to be most material. The moneys thus received can be used as a students' aid fund, and for scholarships, library extensions, and other school purposes and for aiding in the enlargement of Legal Aid activities.

The prestige of the university and school and the legal clinic, as *general counsel*, will in itself bring business to this clinical law office, just as in the case of an office known to be acting as *general counsel* for an important trust company or banking clientage. It will be possible to give some special and peculiarly expert attention to counsel work, including the preparation of briefs and the preparation and argument of appeals. Clients and outside lawyers will naturally feel exceptional confidence in the honesty, ability and general earnestness and trustworthiness of the clinic, its staff, and its work. It would be quite within the limitations and sanctions of professional ethics and of a delicate and discriminating sense of professional propriety, even to ask for and solicit business for the purposes of such a clinic. Especially, for the sake of experience and for necessary clinical purposes, should business be sought from the title companies and the trust companies. Certainly, also, all alumni may be boldly and confidently appealed to for business and support of all sorts and in all ways. These various sources and considerations ought to yield and lead to much useful work.

There will be great advantages for the student in the student-ship or clerkship served in such a clinic over the clerkship served in the ordinary law office in the ordinary way, in that he will, on the one hand, gain the constant and interested systematic attention, advice and instruction, with classroom work, already referred to, and, on the other, will to a great extent avoid the exaggerated and distracting commercial atmosphere, with specialized work, which, nowadays, necessarily prevails even in many of the best law offices. He will thus be able to substitute, for the comparatively narrowing and cramping influences of such constant surroundings, the benefits arising from the classroom work and "demonstrations" of the clinic, with its general unrestricted practice, and from the moral tone and professional spirit developed in contact with experienced lawyers possessing character and personality, who are devoting themselves to the betterment of their profession rather than to the sole end of "making a living" out of the law.

In due time, also—perhaps immediately—the courts and the bar examiners will naturally give *preferential consideration* to a

clerkship served in a *clinic*. This must necessarily follow, because of its manifold advantages, some of which have been pointed out, over the disappointing, highly specialized, routine clerkship in an ordinary office. The court rules might properly provide for a *one-year* clerkship, to be served in the *clinical course* of a law school, as against a new requirement of *eighteen months or two years* in an *office*. The ordinary clerkship, as now served, is too short. Frequently, the whole year is practically thrown away.

As another advantage and encouragement, it will probably be practicable, in the case of efficient students, to remit law school dues, in whole or in part, or to pay some compensation, in the same way, if not in the same degree, as student-clerks are, prior to their admission to the bar, sometimes paid in ordinary down-town offices. That will meet the competition of the regular law offices—but a special fund may be needed. All this, however, will be *unnecessary, if the clinic be made a part of the curriculum for the entire law school course*. That is the goal to be won.

In addition, the clinic and the alumni committees, combined, will make it a business to find proper office connections for students, after admission to the bar.

To satisfy, for the present, the needs of students who, for any reason, cannot attend a law school or a law school clinic—a class of candidates for the bar which should be eliminated as quickly as possible—and at the same time to advance the clinical idea, the clerkship period in the ordinary office should be *increased*, as indicated, and by rule of court (under statutory authority, if need be) such lawyers as may be selected by the court should be *required* to receive students and to furnish to them *genuine clinical opportunities and instruction*. Of course, such instruction could not approach that of the law school clinic, with its classroom work, for systematic thoroughness and for variety in clinical opportunities. Nevertheless, such a rule would actually secure for that class of students reasonable instruction and experience, not now obtainable, and, as officers of the court, lawyers would be bound to respond.

One word more, as to rounding out the purposes of clinical instruction, and our task will be finished. It is of vital importance to the welfare of our profession that we restore professional solidarity among lawyers, and as between lawyers and students, by enlarging the opportunities for professional intercourse, and by promoting acquaintance and good fellowship among students

and members of the bar. Time will not permit the development in detail of this suggestion in this memorandum. The general purpose should be to maintain professional contact and the professional spirit. Let students constantly be sent about as messengers among members of the bar, in the conduct of the business of the clinic and in general office work, and, above all, let the old custom of general bar meetings and occasional addressés be restored in generous measure, with provision for the *required attendance of students*. We all understand the difficulties, at the present day, in the promotion of such meetings and addresses. With the passing of the advocate, and the entrance of the hurrying, practical, commercial spirit, the incentive and much of the necessary aptitude and facility have been lost. There are no real obstacles, however; it is only that the will and disposition are lacking.

Finally, in further emphasizing our aim, let it be said that, in these days and in our communities, we do not need a scientific legal education, or a scientific legal literature (whatever those terms may mean in a common-law country), so much as we do the cultivation, through the influence of the best practitioners, of correct professional instincts and the highest standards of professional honor. These can grow only in an atmosphere created by such practitioners, who are in daily touch with clients, in the actual administration of the law as a *living* force controlling the relations of *living* men. We need educational standardization, with higher educational standards, undoubtedly, but, at this moment, we need patriotism and higher moral and professional standards far more. These are matters of the spirit, which cannot be taught. They can only be felt and absorbed, in experience, as constituent parts of character and personality, and, looking to the future welfare of the state and nation, it behooves us to see to it that hereafter they are acquired in larger measure before our students, of many nationalities, are thrust upon the community as fully equipped practitioners in the law, and as our executives, our legislators and our judges in embryo. That is our duty, and that is the high office and the special purpose of the legal clinic.



# FORMAL CREATION OF A TRUST INTER VIVOS

By FREDERICK THULIN<sup>1</sup>

Of the various devices allowed by the law for the disposition of real or personal property for the purpose of effecting gifts conditional or otherwise, the will has been and, for that matter, is the most popular device or form used. However, with the growth of population in a country rich in material resources, and pregnant with manufacturing and commercial possibilities, there usually follows a concentration of wealth, and an aristocracy arises, not necessarily of birth, but in any event of money. Under such conditions, the will, while extensively used, shares its popularity with any form allowed by law, which will enable the owner of the property to effect gifts during his lifetime of property of which he feels he can dispose, and which is, in a certain sense excess property, and with which he can, conditionally, at least, dispense. And as the material wealth of a class increases the more impelled will they be to dispose of a part thereof during their lifetime in some form allowed by law and controlled by various contingencies and stipulations.<sup>2</sup> That the law provides for machinery to carry out such a wish is a well known fact; the method being commonly known as the trust *inter vivos*.

In England, the rules of law relative to trusts, contingencies, etc., in reference thereto, have, in general, been definitely laid down by the courts<sup>3</sup> and sometimes by the legislative authorities.<sup>4</sup> This is due, of course, primarily to the age of the country and to the further fact that England has had and still has one fountain-head to determine trust law, and not forty-eight as in the United States. In the various commonwealths of this country, the state of the trust law is not nearly as clean-cut or as well developed as the English rules. Obviously such excellence cannot be expected; the country has not attained sufficient age for all the problems to have arisen in

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1. Of the Illinois Bar.

2. A further reason often governing the creation of a trust *inter vivos* is the desire to dispose of property without the necessity of probate proceedings.

A life insurance policy can be made the subject matter of a trust, but to render it free from probate or inheritance tax procedure, the policy should be payable to the trustee and not to administrators, executors or assigns: *Matter of Knowles*, 140 N. Y. 377.

3. Volumes V and VI of *Gray's "Cases on Property"* and *Ames' "Cases on Trust"* are the pioneer and most scholarly collection of cases on the subject, and contain the leading English decisions.

4. Thelusson Act, 39 and 40 Geo. III C. 98; chapter 30, section 155, Illinois Revised Statutes.

any one or more jurisdictions. Furthermore, the multiplicity of state tribunals is not conducive to the development of any well defined system of rules governing trusts, contingencies with reference thereto, etc. The law is clear enough, however, to cover generally the situations to be discussed.

The writer does not purpose to discuss every possible gift that can arise or to cover every possible point that should be inserted in a trust instrument. He has found, however, by an examination of various instruments, many of the illustrations given hereinafter of faulty drafting. The writer has also noted as absent in several of the instruments examined many provisions which a good trust instrument should have inserted. Furthermore, the illustrations given are of trusts that generally arise and are not isolated instances, the work of freakish desires. It is therefore with the object of pointing out certain mistakes that are made, either in commission or omission, and of noting the character of the general run of trusts, that this paper is written.

### THE SELECTION OF THE TRUSTEE

In the creation of a trust,<sup>5</sup> obviously, the first item of importance is the selection of a trustee. As a general rule it is very seldom that an individual nowadays is selected for that capacity; the choice usually being a corporation. There are many good reasons<sup>6</sup> for such a selection, and if any person wishes an enumeration thereof, all he need do is to write to a trust company for the arguments in favor of it. However, at one time in the history of the law of trusts, the corporation could not be a trustee, as quaintly expressed by a reporter several hundred years ago:

"A corporation could not be a trustee because it is a dead body, although it consists of natural persons, and in this dead body a confidence cannot be put, but in bodies natural."<sup>7</sup>

But statutes in all of the United States have given certain cor-

5. A trust *inter vivos* frequently takes the form of a conveyance to a trustee to secure a debt. Obviously such a form is not contemplated in this paper.

A trust *inter vivos* should not be confused with an antenuptial agreement in lieu of dower to take effect at death: *People v. Field*, 248 Ill. 147.

6. Continuity of the trustee, permanency of location, statutory protection for beneficiaries, admitted business methods in the administration of a trust, are some of the arguments advanced.

In this discussion, the trustee, for convenience will be referred to as a corporate trustee.

7. Popham 72. For general consideration of the question see Ames' "Cases on trusts," p. 216, 2nd Edition.

porations power to act as trustees, and the old rule is now a matter of history.

The selection of the trustee having been made the next step is the drafting of the instrument of trust.

## THE INSTRUMENT OF TRUST

### A INTRODUCTION

The first part of such instrument is the introduction and is usually drawn in the following form:

This agreement made and entered into this sixth day of November, nineteen hundred and seven, by and between Robert Lloyd of the City of Chicago, State of Illinois, and the X Trust Company of Chicago, Illinois, witnesseth that:

Whereas, the said Robert Lloyd is the owner of the following described property:

- (1.) \$50,000.00 First Mortgage 5 per cent Bonds of Swift & Co., due 1926, Nos. 1 to 50 inclusive,
- (2.) \$10,000.00 Mortgage note signed by John Doe secured by certain property (describe) bearing 5 per cent interest and due January 1, 1920.
- (3.) 10 shares, \$1,000 par value, Swift & Co., common stock, certificate No. 420 and
- (4.) Real Estate located as follows:  
Lot No. 1, Block No. 2 School Subdivision of Cook County, Illinois; and

Whereas the said Robert Lloyd is desirous of establishing a fund for the benefit and enjoyment of the persons hereinafter mentioned, the said Robert Lloyd for that purpose does concurrently herewith convey, transfer and assign all of the said property above described to the said X Trust Company, to be held by it and its successor appointed in accordance with the provisions of this instrument, and for the purposes and subject to the terms, covenants, conditions, and provisions hereinafter set forth.

The property which is the subject-matter of the trust should be minutely described. This is especially true of corporate securities, since one company is very apt to have several issues of its obligations, with a varying difference in market value. By having a careful description no disputes can subsequently arise, nor can other securities be substituted. The conveyance of the personal property is by mere delivery to the trustee, indorsing of course any security which may need such indorsing. The real estate should be transferred by an ordinary deed to the X Trust Company as trustee, extraneous of the trust instrument (although this method is not always employed). By such a procedure and upon recording, the

public record shows the title in a trustee, thus putting a purchaser on notice but keeps secret the nature of the trust from the general public. If the trust instrument were recorded (as is sometimes done) the title would show on the records in the same manner as the deed, but would also disclose the trust which, for many reasons might not be desirable.

The second part of the instrument is the section formally setting out the object for which the trust is created:

#### B STATEMENT OF THE OBJECT OF THE TRUST

This section of the trust instrument is the most important part thereof, since it is this section which is to carry out the intention of the creator of the trust. It, therefore, behooves the attorney drafting the instrument to exercise the greatest care in the selection of his language, so as to carry out the intention of the creator and to avoid infringing any rule of law that will defeat such intention. Furthermore, nothing should be attempted that is forbidden by law.

As noted previously, it is impossible in this paper to touch on all the possible wishes and desires of a person creating a trust. However, the general run of trusts, and those which consequently deserve greater attention, can roughly be classified as follows:

1. The creator wishes to convey real and personal property to a trustee, he to have the income thereof during his lifetime,<sup>8</sup> then after his death, the property to be given to persons named, usually his children or other relatives. Nothing further is said. The incorrect way of expressing the above desire is as follows:

The X Trust Company, Chicago, Ill., is to hold the above mentioned real and personal property, to collect the income<sup>9</sup> thereof,

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8. The creator may desire to provide for his wife: In this event the phraseology need only take the form of a continuance of the life estate for the wife, after the termination of the creator's life estate.

9. The general practice is to pay the income as collected. In some instances, however, it may be desirable to apportion the income in stated quarterly or monthly installments.

A further question in regard to income arises when securities are purchased or sold below or above par. An amortization although legally sound, assumes too much, viz., final liquidization of the face value. A provision to close all opportunity for argument is advisable. Such a provision should provide that premium or discount should be credited to or debited against principal; that *actual income* collected shall go to the person entitled to the income.

If the trust properly includes any stock, it is advisable to differentiate between stock dividends and cash dividends. It is possibly better, with the trusts under discussion, to resolve all doubts in favor of the person receiving the income thus:

"All stock dividends payable to the trust estate including the sale value of any subscription rights, or the right to exercise subscription rights, shall

and to pay the same to the said Robert Lloyd during and for the term of his natural life, and at his death, the said property shall be distributed equally among his children, Anna, Ruth, and Caleb.<sup>10</sup>

Drafted as above, the section gives to Anna, Ruth, and Caleb, just what the parent probably did not wish to give them, viz: a present interest in the subject-matter of the trust, subject to the life estate in the creator. Being a present property right any of the children can assign the same (if in their minority, subject to the ordinary disability of infancy) during the lifetime of the parent; or, if any or all of the children die before the parent, then such share or shares descend according to the statute of distributions, or by will, if such child made a proper will. Furthermore unless the right of revocation (discussed *post*) were reserved to the creator, the vested rights of the children cannot be disturbed by any act of the creator, and, obviously, by no act of the trustee.

The creator of the above trust possibly had the wish if any of the children should die before he did, that the share go to the survivors, and if all died before his death, that the property would go somewhere else, to a relative, or to some institution. The wish should be expressed thus: (continuing with the above draft)

Provided, however, that if one or more of the above named children shall die<sup>11</sup> before the said Robert Lloyd, the share of such deceased child or children shall be divided equally among the sur-

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be considered as income and so received and accounted for by the trustee hereunder. In all cases where subscription rights accrue, and the right is not sold, but is in the judgment of the trustee exercised and stock taken by the trustee, it shall make an appraisal of the cash value of the stock so acquired over and in excess of the price paid by the trustee therefor, and (adjusting fractional shares in cash) stock acquired to the cash value of such excess shall be set apart and considered and disposed of as a stock dividend."

If, however, the creator wishes to restrict the income to cash only, the following will suffice:

"No stock dividends, or rights to subscribe for stock whether availed of, or sold by the trustee, shall be considered as income, but the same shall be considered as an increment in value of principal and added to principal account of the fund in which the stock is held upon which such dividend or right accrues."

The accountant's test of income and principal charges or credits, is usually a safe one to follow. Thus general taxes on real or personal property are properly a charge on income, as are the general expenses incurred in the trust administration. Special assessments, however, are properly principal charges. Usually no difficulty is experienced in determining the respective methods of charging. See further Note 43.

10. The ordinary situation of a vested interest subject to a life interest.

11. The creator may wish to provide for any possible grandchildren in this particular situation.

Such a wish can be covered by a provision stating in substance that when the fact is ultimately determined where the property is to go and a parent has died leaving offspring who cannot participate because the parents' interest never became vested, such offspring shall, if then living, be entitled

vivors, or inure to the survivor, as the case may be, and if all the children shall die before the said Robert Lloyd, then the property shall be transferred by said trustee or by the successor duly appointed, to the X University.

Or, if the creator wishes, he may state: "to his brother, John, if he be then living, and if he be not alive, then to the X University."

Or, he may state: "the property shall then revert to his estate."

2. Another class of trusts that frequently arises is the one in which the creator thereof transfers real and personal property to the trustees, reserving a life interest to himself and providing for his children that are already born and wishing to provide for those unborn. A frequent draft of the clause reads as follows:

The X Trust Company of Chicago, Illinois is to hold the above mentioned real and personal property, to collect the income thereof, and to pay the same to the said Robert Lloyd, during the term of his natural life, and at his death, the said property shall be distributed equally among his children.

The above form accomplishes part of the creator's wish, viz: that the children *in esse* at the time of the creation of the trust and all children born up to the time of his death, will participate in the property. The same criticism can, however, be levelled at this form, as was noted in the previous one, to wit: the language is vested; i. e., the children living at the time of the creation of the trust and the children unborn as soon as born, have present rights which cannot be disturbed, except as noted previously. The share of each child, however, is not ascertained until the termination of the trust; viz: the creator's death; then all the children living at the time of the creation of the trust and all born subsequently thereto will participate, if living. If any child or children have died in the meantime, the respective estate or estates of the deceased will participate.

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to share in a certain arbitrary portion of the property. Thus if Anna and Ruth die before the creator—Ruth leaving a son, who with Caleb survives the creator, Caleb would take all the property to the exclusion of such son. It would be very feasible to provide for such son to receive a third or if there be more than one child alive that a third shall be equally divided among them. Such a possibility should at least be called to the creator's attention.

As, however, such offspring would probably be unborn at the time the trust is created, there should be, as a matter of safety, a further provision stating that if any such offspring be more than twenty-one years of age before the contingency of vesting happens, such offspring shall be deemed as non-existing. No question can therefore arise whether there be a violation of the rule of perpetuities. The writer is not prepared to state that the rule is violated although the last provision be not present. However, a draftsman should have "safety first" in mind and not indulge in any undue flirtations with the rule.

Such a result is usually quite contrary to the one desired. If the matter of his intention were brought out, the creator would probably state:

"I wish a life estate for myself, and my children living at my death shall share equally. If any die before me, their share or shares shall go to the rest and if all die before me, I wish the property to go to my brother John. If he is dead, then to the X University."

To express the wish formally:

The X Trust Company, Chicago, Illinois, is to hold the above mentioned real and personal property to collect the income thereof and to pay the same to the said Robert Lloyd during the term of his natural life, and at his death the said property shall be distributed equally only among such of his children as are living at his death, or if only one child be alive, then to such child, including any child or children with which his then lawful spouse shall be *enciente* and which shall be born and *live three days*.<sup>12</sup> Provided further, that if there be no child or children living or no child or children with which his lawful spouse is *enciente* at the time of his death, and which shall not live the required three days, then the above mentioned property shall be given to his brother, John; Provided further, that if the said brother, John, be not alive at the death of the said Robert Lloyd, then the property shall go to the X University.<sup>13</sup>

3. Still another classification of the trust is one in which the creator reserves a life interest to himself and after his death, the property is to go to the children of a then living person, usually to the children of one of his own children. The incorrect way of stating this intention is:

The X Trust Company, Chicago, Illinois, is to hold the above mentioned property, collect the income thereof and to pay, etc., and at the death of the said Robert Lloyd the said property shall be distributed equally among the children of his daughter Anna.

The first point worthy of notice is that the above language does not give all the children of his daughter Anna an equal share in the property; i. e., the class of children that will participate are the children born up to the time of the creation of the trust.<sup>14</sup> Any children

12. If a child live three days, ordinarily it has some chance of reaching maturity. If it die before three days it has a vested interest anyway, which may cause some inconvenience.

13. It is also advisable to provide for a guardianship in the event of any or all of the children being in their minority. This caution is applicable to other drafts where the interest of minor children is apt to be present. It should be noted that this draft makes no provision for grandchildren. The principle of note 11 is equally applicable here.

14. *Gray's "Cases on Property,"* Vol. V., pp. 268, 273. Except possibly there are no children born at all to Anna when such trust is created. If no children living then all children born to Anna will participate.

*Gray's "Cases,"* Vol. V., p. 250 (2nd Edition).

that his daughter Anna may have after such creation, are barred from participating. This result would probably not be the one wished by the creator of the trust if it were called to his attention. The same error of the previous examples is present in the above draft; viz: the words are of a vesting character and not contingent; that is to say, the children living at the time of the creation of the trust have a present property right, which is not taken away from them by the fact of their death prior to that of the creator. No provision is made in the event of any or all of them dying before the life estate terminates. The correct way of drafting the section, so as to give expression to the wish of the creator of the trust, is as follows:

The X Trust Company of Chicago, Illinois, is to hold the above mentioned property, etc., collect the income thereof and pay, etc., and after the death of the said Robert Lloyd, the said property shall be divided equally among the child or children of his daughter, Anna, whether such child or children be born prior to or subsequent to his death.

Provided, further, that no child or children born to his daughter, Anna, after she has reached the age of forty-nine years,<sup>15</sup> shall be allowed to participate. It is further provided that the shares of any child or children dying prior to his death, or prior to the death of his daughter, or prior to the period at which the maximum number of children of his daughter, Anna, is ascertained, shall inure to the survivor or survivors, and in the event of the death of all the children prior to his death or prior to the death of his daughter, Anna, or prior to the period fixed for the determination of the maximum number of children that can possibly participate, the property shall go to—(here insert disposition, but if to a natural person, provide that if such person be not alive, the property shall go elsewhere, to some institution, etc.)<sup>16</sup>

4. Another illustration of a class of trusts where carelessness in the drafting quite frequently defeats the intention of the creator is of the cases in which the property is conveyed to a trustee to allow the income to accumulate and then to be paid to his living son (or it may be any living person) when such son reaches the age of twenty-one years. Quite frequently this intention is expressed as follows:

The X Trust Company of Chicago, Ill., is to hold the above

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15. Inserted to avoid the question of how long it is possible for a woman to bear children. It would also be well to insert a provision that any income accruing after the death of creator and up to the determination of the children who will participate, shall accrue as principal.

16. No question of a violation of the rule against perpetuities arises here. If the interest is to vest at all, it will vest within twenty-one years after the death of a living person, viz: Anna or of the creator, Robt. Lloyd.



mentioned real and personal property, collect the income thereof and invest the same *as hereinafter authorized* and when his son, John, reaches the age of twenty-one years, the said property together with the accumulations thereon as represented by investments made by the said X Trust Company of etc., as authorized, shall be given to his said son, John.

If it be the intention of the parent that John is to receive the property *in praesenti*, subject to postponment in receiving it until he reaches the age of twenty-one years, the section is properly drafted, as it gives John a present right in the property, and if he die before reaching the required age, his next of kin, or whomsoever is designated by the statute of distributions, will receive the property at the time when John would have reached twenty-one years of age had he been living. Although "when" is regarded as a word of condition; i. e., making it contingent that John reach the age of twenty-one years before he or his next of kin receive anything at all, the words "shall be given" or "to be paid" are words of vesting.<sup>17</sup> The courts usually construe an estate as vested rather than conditional, and if words of condition and words of vesting be present, they incline toward the latter and reject the former.

The section properly drafted as a conditional gift to John upon reaching the age of twenty-one years is as follows: (continuing with the above draft)

Provided he reach the age of twenty-one years, and if he die prior to that time, the property shall revert to Robert Lloyd or to his estate (or insert any other disposition).

The condition of attaining any certain age (as a matter of safety in some jurisdictions because of a misapprehension that may arise in regard to the rule against perpetuities) should not be more than twenty-one years subsequent to the creation of the trust, that is to say, if John then be six years of age, then making age a condition to receiving the property must be limited to twenty-seven years of age; if beyond that it is conceived that the stipulation violates the rule against perpetuities with the consequent result of such violation.<sup>18</sup>

17. *Gray's "Cases,"* Vol. V., p. 219 (2nd Edition).

18. Possibly true in Illinois under *Eldred v. Meek*, 183 Illinois 26, but not under a correct application of the rule against perpetuities. Being a gift to a living person it must vest if at all within the prescribed period. See *Davenport v. Kirkland*, 40 N. E. 304 (Ill. case); *In re Gerber's Estate*, 46 Atl. 497; *Weinbrenner's Estate*, 34 Atl. 215.

Prof. Goodwin of Boston University tries to differentiate the case from the following: To A from and after twenty-five years: contending the latter is a violation of the rule against perpetuities. The distinction seems to be rather nice, but not altogether sound. See *Goodwin* on "Real Property" (1st Ed.), 281.

If it be the desire of the creator of the trust to postpone the enjoyment thereof by his son,<sup>19</sup> John, until John reaches twenty-eight or thirty years of age (assuming John is now two months old) the phraseology should be thus:

The X Trust Company, etc., provided he reach the age of twenty-one years, at which time the property shall vest in him, the X Trust Company to deliver the said property to his son, John, when he reaches the age of thirty years.

Provided, further, that if his son do not reach the age of twenty-one years, the property shall revert to the said Robert Lloyd or his estate.

5. The condition of attaining a certain age is the most common of conditions. Marriage, however, is another contingency that quite often arises. There is a marked difference between the rules of construction in the case of the contingency of marriage and the case of contingency of reaching a certain age. If the language used were: "The X Trust Co., etc., is to hold etc., and when his son, John, marries, the said property together with, etc., shall be paid to him," the courts would construe it as contingent<sup>20</sup> upon John's marrying, although if the contingency expressed were a certain age, the courts would construe it as vested, as heretofore noted. But the above language is bad as violating the rule against perpetuities;<sup>21</sup> for the marriage may possibly take place twenty-one years after the creation of the trust. The instrument properly drafted should limit the time of the marriage twenty-one years after the creation of the trust; thus, if John be eight years old, the trust instrument should limit the contingency of the marriage to the age of twenty-nine years; furthermore, the instrument should provide for the disposition of the property in case of no marriage prior to the time limited. Properly drafted the section should read as follows:

The X Trust Company of etc., is to hold the above mentioned property, real and personal, collect the income thereof, invest the same as herein authorized, and when his son John marries, the said

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19. *Clafin v. Clafin*, 149 Mass. 19. But such a doctrine is really no protection. Being vested it can be assigned, levied on for debts, etc. Subject to postponement, protection if any, is in the creation of difficulties against disposition. However, the temptation to dispose of the interest below its value is also present.

20. *Gray's "Cases on Property,"* Vol. V, p. 221 (2nd Edition).

21. For Illinois only—see note 12. The son being in existence, there cannot be a violation of the rule, although John may not marry for 50 years from the creation of the trust. The estate to vest at all must vest in the life of a person in existence at the time the trust is created. By no possibility can it vest otherwise.

property together with the accumulations thereon, as represented by other investments made by the X Trust Company, as authorized, shall then be given to his son.

Provided, further, that the marriage of his said son shall not in any event be later than the time when the said John shall be twenty-nine years of age. It is further provided that if his son, John, does not marry at any time prior to his reaching twenty-nine years of age, the said property together with the accumulations thereof, shall revert to his estate (or any other disposition might be made that the creator wishes).

6. Another form of the contingency that deserves great care in the drafting is the gift to trustees to deliver the property to his named children when they reach a certain age. If at the time of the creation of the trust, the children to whom the property is given are in existence and named, the phraseology should never be thus:

The X Trust Company of etc., and when his children Frederick, Ruth, George, and Harry reach the age of twenty-one years the said property together with the accumulations thereon, etc., shall be divided equally among the said children.

Provided further that if any one or more of the said children die prior to reaching the age of twenty-one years, the share of such deceased shall inure equally to the benefit of the survivors or survivor, and if all the children die prior to reaching the age of twenty-one years, the property shall revert to Robert Lloyd or to his estate, as the case may be. (He may of course, insert any other disposition).

The above draft does not make the interest of the children vested and provides for the contingency of any or all of the children dying before reaching the specified age. It omits, however, a provision for the following contingency and one very likely to happen; viz: the reaching of the required age by one of the children, say Frederick, while one or more are as yet in their minority and uncertain as to whether they will ever reach the age of twenty-one years. In such case the rule of law arbitrarily<sup>22</sup> supplying the creator's intention is as follows:

That upon Frederick's reaching the age of twenty-one, the property is divided equally among the children living, whether they have reached the age of twenty-one years or not. The draft above should have this addition to be complete:

Provided, further, that if any one or more of the children reach the age of twenty-one years while any one or more have not reached the age of twenty-one years, such child or children shall be paid their share of the said property, only when it is ultimately determined

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22. *Gray's "Cases,"* Vol. V., pp. 253, 256 (2nd Edition).

how many children shall participate. After the word "survivors" in the second paragraph, the following should be inserted in parenthesis: (whether such survivor or survivors be twenty-one years or over).

The age limit to be reached need not be twenty-one years, but, as a matter of caution in some states, should not extend beyond the period of twenty-one years after the age of the youngest child; thus if Anna be four years old when the trust is created, the age limit is twenty-five years. Thus any age between twenty-one and twenty-five years is allowable. If beyond twenty-five years, the gift may be conceived of as clashing with the rule against perpetuities.<sup>23</sup>

7. The above illustration concerns itself with children already in existence, as is by far the more frequent case; yet it happens that a creator often wishes to provide a trust for his children unborn, or the unborn children of some one else, his daughter for instance, to be given to them when they reach their majority. The same caution noted in reference to the preceding draft is also applicable here except that the age limit can be only twenty-one years; if beyond this, the gift violates the rule against perpetuities.<sup>24</sup> The draft should read thus:

The X Trust Company of, etc., shall hold the above mentioned property for the said Robert Lloyd until his death, or until his children (or if the gift be to the children of his daughter, Anna, so state)<sup>25</sup> reach the age of twenty-one years, when the said property together with the accumulations thereon, shall be equally divided among them.

Provided, further, that if any of the said children die prior to

23. Possibly true for Illinois only, if the court were to hark to the rule of *Eldred v. Meek*, noted ante, note 18. The class being of persons *in existence* at the time the trust is created, can, of course, be ascertained within the required period. The class being a unit and of living persons, should logically be classed as an individual for the purposes of the rule. See note 18 supra.

24. If, however, one of the class include a person or persons *not yet born* at the time the trust is created, the class is analogous to a gift to an unborn person of a then living person; viz: the limit for vesting must not be beyond its age of twenty-one years. If more than that, say twenty-five years, there is a possibility that it may vest later than twenty-one years from life or lives in being, it is too remote. Thus if X have a life estate, then to his daughter when she reaches twenty-five years of age—and one year from that time has a daughter, the effect would be a limitation to the daughter from and after twenty-four years, with *no life* to support the gift, as the daughter was not a living being when the trust was created.

See *Goodwin* on "Real Property," 281 (1st Edition).

A class might resolve itself, through deaths to the persons not in existence when the trust was created. If such persons were to take after twenty-one years, it is clearly seen that the rule is violated.

25. Also state whether such children are born before or after the creator's death. See note 14.

reaching the age of twenty-one years, its share shall inure equally to the benefit of the survivor or survivors, whether twenty-one years of age or not, and if all the children die prior to reaching the age of twenty-one years, the property shall go (here insert disposition).

Provided, further, that if any one or more of the children reach or have reached the age of twenty-one years such child or children shall be paid their share of the said property only when it is ultimately determined how many children shall participate.

It is further provided that no child born after the said Robert Lloyd reaches the age of fifty years<sup>26</sup> (if he live so long) shall participate in the said property (or if the children be of his daughter, state a certain age beyond which there is *no prospect of children being born to her.*)<sup>27</sup>

If the creator wishes to reserve an interest in the property until the children are ready to take, the draft would be almost the same, viz:

The X Trust Company of, etc., is to hold the above mentioned real and personal property, collect the income thereof and pay the same to the said Robert Lloyd until his death, or until his children (or if the children of his daughter, so state) reach the age of twenty-one years and shall participate equally as hereinafter set forth, whichever event comes the sooner.<sup>28</sup> (Followed by paragraphs 2, 3, and 4).

8. The contingency of marriage vesting the property is ordinarily confined (and from the nature of the cases must necessarily be so) to the living children of the creator of the trust or of some one else. Sometimes the section covering the wish is very carelessly drawn, as:

The X Trust Company, etc., and when the children of the said Robert Lloyd, (Anna, Harry, and Ruth,) marry, the said property together with the accumulations thereon, etc., shall be equally divided among them.

Such a draft in some states may possibly be conceived of as violating the rule against perpetuities.<sup>29</sup> Furthermore it makes no provisions for the case of one marrying while the others are single, and is in general a bad draft. In the case of reaching a certain

26. If all the children have reached twenty-one years, and Robt. Lloyd is fifty years of age, there is hardly any use of waiting to see whether there will be one more born.

27. Statutes sometimes touch on the rule against perpetuities, generally declaring the common law, except in some instances limiting the lives in being. I *Stimson* "Am. St. Law," 1440-1442.

28. There is a possibility that there may be a gap between the time of the death of Robt. Lloyd and the time of the ascertainment of the children who will participate in the property. Provision could be inserted stating that any income accruing during this period shall be considered as principal.

29. In Illinois only if the court persists in following *Eldred v. Meek*, note 18.

age, as in the previous cases, the creator of the trust probably did not wish a division of the property until it is ascertained how many children will share therein, but in the case of the marriage, the intention is probably to have the children receive their share as soon as they marry. But if the section be carelessly drawn, the whole matter is thrown in doubt. To clearly state the intention of the creator, the language should read thus:

The X Trust Co. of, etc., is to hold the above mentioned real and personal property, collect the income thereof, invest the same as herein authorized, and when any one or all of his children, Anna, Harry, and Ruth, shall marry, a division of the said property together with the accumulations<sup>30</sup> thereon, shall be effected as hereinafter authorized, and the share or shares of such child or children as shall marry be given indefeasibly to the one or ones marrying. If any child or children shall die prior to marrying, the trustee shall effect equal division of the property in the same manner as provided for the marriage of any child or children, and the share of such child or children that have died shall (here insert disposition; it would usually be to his estate).

It is further provided that the marriage of any of his said children, Anna, Harry, and Ruth, must in any event take place within twenty-one years after the date of this instrument, and the share of any one or more of such children as shall be unmarried twenty-one years after the date of this instrument, shall revert to his estate.

The last paragraph is inserted to avoid raising any question in some states whether the draft would infringe the rule against perpetuities.<sup>31</sup>

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30. *Thelusson v. Woodford*, 11 Vesey 112, is in effect in many jurisdictions of the United States. As a general proposition the rule against accumulations is coextensive with the rule against perpetuities, although it is conceivable that a gift may not be within the rule against perpetuities, yet it will be subject to the prohibition against accumulations. But the gift is only void as to the excess accumulations. *O'Dell v. O'Dell*, 10 Allen 1, unless it accumulate to charities. *Gray "Perpetuities,"* 678.

The drafts herein given are not very apt to violate the rule against accumulations. To guard against a possible excess, the creator may insert a provision, that if there be any violation of a legal prohibition such excess shall go to a charitable or public or educational institution. It logically would be sustained if limited to an individual named, or in existence, or children of said person.

For the English rule see 39 and 40 Geo. III C. 98, and *In re Woods*, 3 Chan. 381 (1894). For the general American attitude see *Bouvier's "Law Dictionary"* (Perpetuities).

Local statutes should, however, be examined on the subject as in some jurisdictions the accumulations are limited to a definite number of years. See *Stimson "Am. St. Law"* 1443; *Brandt v. Brandt*, 34 N. Y. Supp. 684.

31. For Illinois—if the court were to persist in following *Eldred v. Meek*: ante, note 18.

It is clear that the contingency of marriage for an unborn person or

9. The spendthrift trust is a rather useful trust under certain circumstances, and for a certain class of persons. Such trusts are not allowed in every jurisdiction, but if the particular jurisdiction in which it is sought to be created will not allow such a trust, it is comparatively simple to create the trust in some jurisdiction that has no prohibition on this point.<sup>32</sup>

The X Trust Company, etc., is to hold, etc., collect the income thereof and from said income of such trust estate in its charge, said Trustee shall pay to ..... for and during the term of his natural life, but only upon the following express terms and conditions. Such income shall be paid to said John personally and the same shall not be payable to any other person by reason of any transfer or assignment, by operation of law or otherwise of any supposed or possible right of said John to receive same. And in the event that said John shall by operation of law, or by reason of any act of his be barred or prohibited from receiving the payment of any installment and applying the same to his own use, such installment shall not be payable to him, but shall be payable by said Trustee to his wife, if any, who shall then be living with him, and if he have no wife then living with him, to his eldest next of kin, which money so paid to said wife or said next of kin, as the case may be, shall be applied to the care, board and clothing of said John, as far as may be proper or necessary in the judgment of the Trustee.

It is further provided that upon the death of the said John, the property together with any unpaid income shall (here insert any disposition the creator wishes).<sup>33</sup>

10. There is a further class of trusts that does not often arise, to wit: trusts which attempt to provide for the unborn children of unborn children. The situation may arise at the time any children of the creator of the trust are to be married. The creator may have the very commendable desire to provide for his future grandchildren and even his great-grandchildren. But the furthest a trust can be created to vest any interest in the future, would be an interest that must vest, if at all, twenty-one years from the date of the trust, or after a life if limited after a life. It follows therefore that in gen-

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persons is void as violating the rule against perpetuities unless limited to the age of twenty-one years.

If the class be of living children, the contingency of marriage can logically be limited to forty years as well as twenty-one years, without violating the rule.

It is conceivable that the children marrying the latest in point of time, may receive the largest share of the estate.

32. Illinois allows the spendthrift trust, *Wagner v. Wagner*, 244 Ill. 101. For the latest expression on a spendthrift trust see *Corkery v. Corkery*, 111 N. E. 795.

33. The writer is indebted to Mr. C. R. Holden of the Chicago Bar for the drafts on the spendthrift trust and the provision relative to the stock and cash dividends; see note 9.

eral any contingency expressed or implied to vest the property, must take place before or at the age of twenty-one years of the grandchildren. (See draft 3.) A gift that under any possible combination of circumstances might vest after that time is an infringement of the rule against perpetuities. Thus unborn children of unborn children as a matter of certainty can never take, because the implied contingency of their birth may happen beyond the required time.

### C MISCELLANEOUS PROVISIONS IN REFERENCE TO THE ADMINISTRATION OF THE TRUST, ETC.

The first provisions that should be inserted in a good trust instrument are

1. A provision allowing the creator of the trust to revoke the same at any time.

The provision with reference to allowing the creator of a trust to revoke it, is one that is generally upheld by the courts at the present time. The only possible objection to allowing such a provision is that the provision may be used by the creator to avoid payment of the inheritance tax<sup>34</sup> (in jurisdictions where there is such a tax) or to avoid paying creditors,<sup>35</sup> while practically retaining exclusive control of the subject-matter of the trust. In any event the

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34. The Illinois Inheritance Tax authorities assess a trust estate upon the death of the creator of a trust, if the right of revocation be present in the trust indenture, in the same manner as any other property passing by will or the statute of distribution. They would not, of course, touch any trust property where the right of revocation does not exist. If the right be present it subsists for all other purposes. Other jurisdictions follow the same procedure.

Under the Federal Inheritance Tax Act of Sept. 8, 1916, and Treasury Decision 2378, rendered Oct. 10, 1916, a radical departure from the state rules is noted in the federal procedure. Transfers to trustees two or more years *prior* to the death of the creator of the trust, shall be investigated by the collector, and if such collector is satisfied that the transfer was made with a view of providing for the beneficiary after or because of the creators death, the estate is taxable. If such transfers were made *within* two years of such death, the same shall be taxable without any investigation; the burden of disproving being on the estate of the deceased. If a provision of revocation be present, the fair inference is that the presumption in favor of the government is conclusive, whether the transfer was made prior to or within two years from death.

The Federal Act is co-extensive with and not exclusive of the state statute or the inheritance tax.

35. Power of revocation in part, as power to dispose by will, or power implied as by mortgaging or selling without any accounting, will render the trust estate subject to creditor's claims. Clearly an express right of revocation will render it subject to a creditor of the creator. *Nolan v. Nolan*, 218 Pa. 135.



provision should be inserted as the trust created without the provision cannot be revoked or destroyed by any act of the creator.<sup>36</sup> The creator may change his mind as to the beneficiaries and, if he wish, may create the means for carrying out his altered intentions. The draft is usually a very simple one, the following being an example:

It is hereby provided that the said Robert Lloyd shall have the power to revoke or alter the said trust at any time either in part or in whole, or to add supplementary provisions by giving a written notice, duly acknowledged before an authorized public officer to the X Trust Co. of, etc., to that effect. Furthermore the right of revocation may be exercised only by the said Robert Lloyd personally and not by any attorney, general or special, or by any legal process.<sup>37</sup>

2. A provision for the appointment of a successor in trust.

This provision is one that may be inserted for the benefit of the trustee or for the benefit of cestui, or for the pleasure of the creator of the trust. As a general proposition a court will never oust a trustee on the petition of the creator or beneficiary, so long as the trustee is faithfully performing its duties. And where the trust is a lucrative one, the right to be a trustee is valuable and one which the trustee is loath to surrender. However, in some instances, the trustee may desire to resign as trustee, which it cannot ordinarily do without legal intervention, unless it procure the consent of the beneficiary, a difficult matter sometimes. From the point of view of the trustee, the provision relative to the appointment of a successor would read as follows:

The X Trust Co., of etc., may resign as trustee at any time it so wishes, by giving a written notice to that effect sixty days prior to the date on which the resignation is to take place. The said notice shall be effective if given to the creator of the trust if he be alive, it being hereby specified that in this event the creator shall have the right and privilege of making a further appointment, and if he be not alive, then and then only shall such notice be given to the majority of the beneficiaries, if there be more than two, or to two if there be but two beneficiaries.

It is further provided that by the term beneficiaries is meant the beneficiaries vested in interest and those dependent upon a contingency, (if they be in existence).

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36. *Viney v. Abbott*, 109 Mass. 302; *Aubuthon v. Bender*, 44 Mo. 565. This is true even as to unborn children and naturally true if the interest is contingent in other respects: *Petre v. Espinasse*, Mye and K. 496. But see the rather peculiar attitude of *Garnsey v. Muney*, 24 N. J. Eq. 243.

37. The creator in revoking must use the method outlined. If no particular method is specified, any act showing an intention to revoke is sufficient. *Tudor v. Vail*, 195 Mass. 18.

It is further provided that a majority of the beneficiaries shall have the right to appoint a successor in trust<sup>38</sup> if such beneficiaries be more than two, and if there are but two beneficiaries, the two shall have the right to appoint a successor to the X Trust Company. If no appointment be made as outlined, the X Trust Company may petition a duly recognized legal tribunal to appoint such successor.

3. A provision with reference to the right of the trustee to invest trust funds.<sup>39</sup>

A trustee's right to invest is somewhat circumscribed by legal rules; i. e., it cannot usually invest in those securities generally sanctioned by business men, but is confined to a select class of securities. If the trustee invests otherwise it acts at its peril. A trustee, especially a corporate trustee, generally wishes to have a broader scope of investing activity than that afforded by the law.<sup>40</sup> In view of the fact that it has securities maturing from time to time during the life of the trust, which funds should be reinvested, the trustee should get its authority to do so from the instrument itself, rather than search the law for its limitations in respect thereto. However, as the provision allowing investing by the trustee has always been severely construed because it varies the legal rules, the provision should be of the broadest possible scope, thus:

The X Trust Company or its successor in trust, shall have the right and is hereby commanded to reinvest any monies with which it shall be possessed during the continuance of the trust, whether such funds are derived from the securities in its possession that have matured and been liquidated, or whether such funds are derived from any real or personal property sold by the said trustee in accordance with the terms of this instrument (and if the trust is an accumulation one as noted *ante*, the further fact may be stated) or whether such funds are derived from the income of any real or personal property so held by it, or from any other source.

The said trustee may invest in any corporate security public or private, or in mortgages on real estate or in any security, which in

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38. Provision should allow the successor in trust the same right to appoint its successor. It might be well also to insert that such successor shall be a corporate trustee.

39. See Ames' "Cases on Trusts," 471 (2nd Edition), for a general discussion of the trustee's duty to invest; also see the late case of *In Matter of Reid*, 170 N. Y. App. 631, where the investment took the form of a renewal of the obligation. A provision allowing a trustee to invest could also provide for this contingency. However, the provision (noted *post*) allowing or authorizing the trustee to take any steps it may deem desirable or expedient in the event of a default, is sufficient to cover this situation.

40. Chapter 140 Illinois Revised Statutes. Some instruments allow the creator to be the sole judge as to the securities in which trust funds shall be invested or reinvested.

its judgment it may deem safe and advisable including such securities which it may itself deal in.<sup>41</sup>

4. A provision with reference to the right of the trustee to make improvements if the property of the trust do or may at some time include real estate.

The trustee is rather restricted in its activity in the matter of making improvements on real estate.<sup>42</sup> In fact the courts generally hold that the trustee is limited to repairs and cannot make improvements. Sometimes the line between improvements and repairs is not very sharply drawn. If therefore the trustee has any real estate, it may very often be in doubt as to whether it is acting safely. It follows therefore that the instrument should provide for the right of the trustee to make improvements. The following draft will suffice as giving plenary powers to the trustee:

The X Trust Company or its successor in trust, shall have the right to make any improvements or repairs on the real estate which is or may be the subject matter of this trust, that in its judgment it may deem desirable or necessary, and such trustee may petition (either at its own instance or may join with others) the proper legal authorities for any improvements deemed desirable or necessary. The cost of any of the said improvements shall be a charge on the said real estate.

The trustee shall have the further right to contract with reference to building restrictions, easements, etc., to give consent to the ordinary use by any public service corporation, whether municipally owned or not, of such premises, as for the purpose of running mains, stringing wires, etc.<sup>43</sup>

5. A provision with reference to the right of the trustee to sell personal or real property and to lease real property.

A trustee unless authorized by a court of competent jurisdic-

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41. Some instruments provide that the creator of the trust or adult beneficiaries must be consulted and approve the investment.

42. For the general question of repairs and improvements see 39 Cyc. 334.

43. It may be desirable to clearly specify that repairs and improvements of real estate shall be charged to the principal and not to the income, or vice versa: selling other trust property if necessary to do this. For further consideration as to items chargeable to income in the event of no provision covering the point, see *In re Brooklyn Trust Co.*, 157 N. Y. Supp. 547.

However, there would be no objection to incorporating a provision with an arbitrary division as to amount to be charged to principal and income, say 50 per cent to income, 50 per cent to principal, or any other percentage the creator wishes. Furthermore the trustee could be authorized to borrow with power to pledge the trust property benefited if the trust estate did not include any cash in the principal. Usually the trust does include enough cash to cover expenses and items properly chargeable to principal. To provide for a repayment of such loan, a certain percentage of all the income could be designated to be set aside.

tion has ordinarily no right to sell any trust property, real or personal.<sup>44</sup> The right to do so is very often desirable for the beneficiaries of the trust. Trust property, especially corporate securities, may take a slump in the market and before the trustee can procure the consent to sell through legal channels, the property may be so depreciated as to be worthless, whereas prompt action in selling may have conserved part thereof. Then again there may be an opportunity of selling the securities at enhanced prices, which may be lost if not seized at once. In a more restricted sense the above remarks apply equally to real estate. As, therefore, the trustee is in general under no duty to take active steps under the conditions noted, the draft should not be of such a character as to abate in any way the right to remain quiescent. The following will be sufficient:

The trustee shall have the right and it is hereby optional for it to do so, to sell in any manner, any or all of the real or personal property of this trust at any time or at any price it may deem advisable to properly conserve the said property, except that the personal property shall be sold for cash, whereas the real estate may be sold for credit on such terms as the trustees may give, except that ten per cent must be paid in cash. The trustee may also lease the said real estate on such terms and for such length of time as it may deem necessary.<sup>44a</sup>

6. A provision with reference to the payment of personal property taxes.

In some states, notably Illinois, property including various forms of personal property is classed generally for the purpose of taxation. As a result of such classification, the tax is at times, almost confiscatory of the income on securities. Individuals in such jurisdictions usually do not schedule (or undervalue in the schedule) their personal property in the form of securities preferring the hazard of a penalty.<sup>45</sup> The trustee holding the legal title to the

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44. If any stock be held by the trustee, it is well to specify the voting right shall be in the trustee, although this fact is generally implied.

44a. See VII ILLINOIS LAW REVIEW 427.

45. It may be desirable to insert a provision in the instrument that at any time the creator or beneficiaries may wish, he or they may appoint as a successor in trust, a corporate trustee in a foreign jurisdiction. By this method oppressive taxation of personal property oftentimes may be avoided.

Whether the trust property, of a trust outside the jurisdiction of the domicile of the creator, with the right of revocation present, is subject to the inheritance tax of the domicile of the creator, is a question not free from doubt.

Real estate in the jurisdiction of the domicile of the creator seems to be, irrespective of the domicile of the trustee. Real estate outside the jurisdiction of the domicile of the creator seems not to be. At least

property, is in the eye of the taxing authorities the same as the individual, and subject in the same manner as an individual, to the revenue act in the jurisdiction in which it is domiciled. The creator of the trust, however, may not wish the trustee to schedule any securities for the purpose of taxation. The section to effect this should throw the onus of the evasion on the creator.

The X Trust Company or its successor in trust, shall not file or cause to be filed any schedule of personal property with any state or county authority, for the purpose of levying a tax thereon, during the creator's lifetime. The said creator Robert Lloyd, hereby warrants that during his lifetime, he will schedule the said personal property with the proper authorities for the purpose of taxation thereon. Furthermore the said Robert Lloyd agrees to hold harmless the X Trust Company or its successors for any liability incurred by it in failing to properly list or schedule the said property with the legal taxing authorities as required by law, and hereby gives the said trustee as a first lien on any property in its possession for any liability incurred by it in following the said behest of Robert Lloyd.

It is further provided however that at the death of the said Robert Lloyd, the personal property of such trust with reference to such taxation, shall be administered in the same manner as if there were no provision present pertaining thereto.<sup>46</sup>

7. A provision with reference to the method of apportionment of the property among several beneficiaries when such division becomes necessary by the terms of the trust.

By the terms of some trusts it becomes necessary at some time to effect a division of the trust estate, as where the property is given to the children of X. There may be several children of X and in the event of the trust property being diversified, the trustee may be presented with a difficult question of fact in the correct apportionment thereof. Some machinery to effect a division should be provided for the safety and convenience of the trustee. The following form is suggested:

At the time or times a division of said trust property becomes

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such would seem to be the rule by a broad application of the ruling of *Van Nuxem's Est.*, 61 Atl. 876. Personal property of the creator seems to be exempt also. See doctrine of *Gilbertson v. Oliver*, 129 Ia. 568, although the exact facts were not present in that case.

If the trust property held in another jurisdiction include any shares of stock of a corporation domiciled in the same jurisdiction as the creator, a further difficulty is raised. Some jurisdictions would undoubtedly hold such shares subject to the tax. (N. J. and Ill. probably would.) See *Beale's Summary "Conflict of Laws,"* Taxation.

46. The question might be raised as to the legality of this provision. It is, however, a provision that is inserted quite often in trust instruments and when present, the trustee does not schedule such personal property. See further note 45.

necessary, the said property may be divided by the trustee on the following basis:

The trustee shall appraise the real and personal property at the fair market value thereof and on the basis of the total valuation thereof, designate any part of the property as valued as the share or shares under the terms of the instrument.

It is further provided that the trustee may designate undivided interests in the real property if any such property be then held by the trustee.

8. A provision with reference to income accrued but not due at the time of the death of a life cestui.

In the case of a life cestui, this situation frequently occurs; i. e., the cestui dies and at the time of such death, there may be accrued income not yet due. To illustrate: the cestui may die in February, and there may be interest accrued to the day of his death but not due and payable until July. If nothing is said in the trust instrument, the accrued interest belongs to the estate of the cestui. In concluding the administration of the trust the payment of the accrued interest may cause inconvenience to the trustee; hence in a very few trust instruments, one finds a provision with reference thereto, usually as follows:<sup>47</sup>

An income of whatever description payable or due after the death of the said . . . . ., although part thereof may have accrued prior to the death of . . . . ., shall be considered as beginning to accrue at and after the death of the said . . . . .

9. A provision with reference to indemnifying a trustee in the event of a trustee being made a party to any legal proceeding because of such trust relationship.<sup>48</sup>

This is a rather important provision, as it is often impossible to tell at what moment a trustee may be involved in a legal proceeding concerning the trust, not in the enforcing of the obligation of the trust, but in a suit against it at the instance of another party. To reimburse a trustee in expending attorney fees, etc., reimbursement of which might be a question of doubt, the following provision should be inserted to resolve the doubt in favor of the trustee. Moreover the insertion of the provision is only fair to the trustee.

The said Robert Lloyd for himself and the beneficiaries of the said trust, agrees to indemnify the said X Trust Co., or its successors in trust for any damage suffered or expenses incurred by it in being a party defendant to any suit at law or in equity brought

47. The writer does not insist that the above provision is exactly desirable or necessary from the point of view of the person entitled to the income.

48. See XI ILLINOIS LAW REVIEW 381, for attorney fees to construe terms of an instrument.

against it for any cause whatsoever (except for its own wilful default), because of its capacity as trustee. The said trustee shall have a first lien on the property of the said trust to the extent of such damage suffered or expenses incurred.

10. A provision with reference to the steps which a trustee shall take in the event it becomes necessary to enforce an obligation of the trust.

In the absence of such a provision a trustee may be in doubt as to the procedure necessary on his part when it becomes necessary to enforce an obligation belonging to the trust, as a note or bond, upon which there has been a default. The law may be uncertain on this point. Therefore, to make the trustee's position clear, the following provision should be inserted in the trust instrument:

If at any time there be a default on the payment of the interest or principal or both, or any note, bond, account or other obligation or security held by the said trustee, the said trustee shall exercise its honest judgment as to the proper legal proceedings necessary to enforce such claim, or whether legal proceedings shall be taken at all, or whether an accord, compromise renewal or any other method shall be taken in order to settle such claim or claims and if the said X Trust Company or its successor in trust, shall exercise its honest judgment in the particular procedure adopted, such action shall not be open for review by any master in chancery, chancellor, or any other legal authority, court, or body.

Any fees expended by such trustee in enforcing the claim or compromising the same, or in any way arriving at the decision as to the proper method to pursue therein, shall be a first lien on the property of the said trust.

11. The matter of fees.

The matter of the trustee's fees is also somewhat important, although in some instruments the word reasonable is used to designate the amount of the fees the trustee is to receive. In some cases the amount of the fees is rendered definite as twenty-five dollars or fifty dollars upon the execution of the instrument and a certain percentage of the income collected, usually three to four per cent. In each case the particular circumstances govern, the amount of work, etc., being the governing factors.

# LAW FROM LAY CLASSICS<sup>1</sup>

## II

### GLEANINGS FROM LAW BOOKS

BY JOHN HILL BURTON<sup>2</sup>

Professional law books and reports are not generally esteemed as light reading, yet something may be made even of them at a pinch. Ménage wrote a book upon the amenities of the civil law, which does anything but fulfill its promise. There are many much better to be got in the most unlikely corners; as, where a great authority on copyright begins a narrative of a case in point by saying, "One Moore had written a book which he called *Irish Melodies*;" and again, in an action of trespass on the case, "The plaintiff stated in his declaration that he was the true and only proprietor of the copyright of a book of poems entitled *The Seasons*, by James Thomson." I cannot lay hands at this moment on the index which refers to Mr. Justice Best—he was the man, as far as memory serves, but never mind. A searcher after something or other, running his eye down the index through letter B, arrived at the reference "Best—Mr. Justice—his great mind." Desiring to be better acquainted with the particulars of this assertion, he turned up the page referred to, and there found, to his entire satisfaction, "Mr. Justice Best said he had a great mind to commit the witness for prevarication."<sup>3</sup>

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1. [This series reproduces, from time to time, some of the choice passages in lay classics, where the law, or our profession, has been treated in satiric or philosophic vein. The series is re-numbered consecutively in each volume of the Review.—Ed.]

2. [The author of this passage was born at Aberdeen in 1809. He became an advocate at the Scottish bar in 1831, but soon abandoned the profession for that of letters. His writings include a *Treatise on the Law of Bankruptcy in Scotland*, a *Manual of the Laws of Scotland*, a work on *Political Economy*, a *History of Scotland*, and numerous contributions to Blackwood's, the *Edinburgh Review* and other periodicals. But his name, at least on this side of the water, is chiefly identified with his *Book Hunter*, a collection of entertaining essays on the curiosities of booklore, which, in their original form, appeared in Blackwood's. The *Book Hunter* has become a *vade mecum* of book-collectors throughout the English-speaking world and has earned an assured place in English literature. The extract here reprinted is from the chapter entitled "The Gleaner and His Harvest." (New York, R. Worthington, 1883).—Ed.]

3. ["This particular reference is almost too good to be true, and I have not been able to trace it to its source. That has been said to be in the index to one of Chitty's law-books, and it is added that possibly Chitty had a grudge against Sir William Draper Best, one of the Puisne Judges of the King's Bench from 1819 to 1824, and Lord Chief Justice of the Common Pleas from 1824 to 1829, in which latter year he was created Lord Wynford. Another explanation is that it was a joke of Leigh Hunt's, who first published it in the *Examiner*."—Wheatley, *How to Make an Index*, p. 157. (New York, 1902).—Ed.]



The following case is curiously suggestive of the state of the country round London in the days when much business was done on the road: A bill in the Exchequer was brought by Everett against a certain Williams, setting forth that the complainant was skilled in dealing in certain commodities, "such as plate, rings, watches, etc.," and that the defendant desired to enter into partnership with him. They entered into partnership accordingly, and it was agreed that they should provide the necessary plant for the business of the firm—such as horses, saddles, bridles, etc. (pistols not mentioned)—and should participate in the expenses of the road. The declaration then proceeds, "And your orator and the said Joseph Williams proceeded jointly with good success in the said business on Hounslow Heath, where they dealt with a gentleman for a gold watch; and afterwards the said Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly, and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath, who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which he believed might be had for little or no money; that they accordingly went, and met with the said gentleman, and, after some small discourse, they dealt for the said horse, etc. That your orator and the said Joseph Williams continued their joint dealings together in several places—viz.: at Bagshot, in Surrey; Salisbury, in Wiltshire; Hampstead, in Middlesex; and elsewhere, to the amount of £2,000 and upwards."<sup>4</sup>

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4. This case has been often referred to in law-books, but I have never met with so full a statement of the contents of the declaration as in the *Retrospective Review* (vol. V, p. 81).

[*Everit* (and not *Everett*) *v. Williams* apparently got into the books through an account published in the *European Magazine* for May, 1787. It was long supposed that the case was a pure legend. (See Pothier on Obligations, Transl. Evans, Vol. II, p. 3, note (a), and the remark of Bacon, V. C. in *Ashurst v. Mason*, L. R. 20 Eq. 230, cited Bates on Partnership, Vol. I, Sec. 119, note 1). But, in 1893, as appears from a note in the *Law Quarterly Review*, the editors of that journal took pains to have the orders of court mentioned in the account verified by the original records, with the result of establishing the authenticity of the case beyond a doubt. From these orders it appears that on October 30, 1725, the bill was referred to the Deputy Remembrancer for scandal and impertinence; that on November 29, 1725, the Deputy Remembrancer's report, finding the bill both scandalous and

Here follows a brief extract from a law paper, for the full understanding of which it has to be kept in view that the pleader, being an officer of the law, who has been prevented from executing his warrant by threats, requires, as a matter of form, to swear that he was really afraid that the threats would be carried into execution.

"Farther depones, that the said A. B. said that if deponent did not immediately take himself off he would pitch him (the deponent) down stairs—which the deponent verily believes he would have done.

"Farther depones, that, time and place aforesaid, the said A. B. said to deponent, 'If you come another step nearer I'll kick you to hell'—which the deponent verily believes he would have done"<sup>5</sup>

I know not whether "lay gents," as the English bar used to term that portion of mankind who had not been called to itself, can feel any pleasure in wandering over the case books, and picking up the funny technicalities scattered over them; but I can attest from experience that, to a person trained in one set of technicalities, the pottering about among those of a different parish is exceedingly exhilarating. When one has been at work among interlocutors, suspensions, tacks, wadsets, multiplepointings, adjudications in implement, assignations, infestments, homologations, charges of horning, quadriennium utiles, vicious intromissions, decrees of putting to silence, conjoint actions of declarator and reduction-improbation<sup>6</sup>—the brain saturated with these and their kindred, becomes refreshed by crossing the border of legal nomenclature, and getting among common recoveries, demurrers, quare impedit, tails-male, tails-female, docked tails, latitats, avowrys, nihil dicits, cestui que trusts, estopels, essoigns, darrein presentments, emparlances, mandamuses,

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impertinent, was confirmed, the report referred back to him to tax costs, and the tipstaff ordered to attach the bodies of the plaintiff's solicitors for contempt; and that on December 5, 1725, the plaintiff's solicitors were fined £50 each and committed to the custody of the Warden of the Fleet until the fines should be paid, and counsel who signed the bill was required to pay the costs. 9 L. Q. R. 107.—Ed.]

5. It is curious to observe how bitter a prejudice Themis has against her own humbler ministers. Most of the bitterest legal jokes are at the expense of the class who have to carry the law into effect. Take, for instance, the case of the bailiff who had been compelled to swallow a writ, and rushing into Lord Norbury's court to proclaim the indignity done to justice in his person, was met by the expression of a hope that the writ was "*not returnable* in this court."

6. [This enumeration of Scottish law terms recalls Robert Louis Stevenson's remark, regarding his law studies, in *An Apology for Idlers*, that he still remembers "that emphyteusis is not a disease nor stillicide a crime."—Ed.]

qui tams, capias ad faciendums or ad wethernam,<sup>7</sup> and so forth. After vexatious interlocutors in which the Lord Ordinary has refused interim interdict, but passed the bill to try the question reserving expenses; or has repelled the dilatory defences and ordered the case to the roll for debate on the peremptory defences; or has taken to avizandum; or has ordered re-revised condescendences and answers on the conjoint probation; or has sisted diligence till caution be found *judicio sisti*; or has done nearly all these things together in one breath—it is like the consolation derived from meeting a companion in adversity, to find that at Westminster Hall, “In fermedon the tenant having demanded a view after general imparlance, the demandant issued a writ of petit cape—held irregular.”

Also, “If after a *nulla bona* returned, a *testatum* be entered upon the roll, *quod devastavit*, a writ of inquiry shall be directed to the sheriff, and if by inquisition the *devastavit* be found and returned, there shall be a *scire facias quare execution non de propriis bonis*, and if upon that the sheriff returns *scire feci*, the executor or administrator may appear and traverse the inquisition.”

Again, “If the record of *Nisi prius* be a *Sancti Trinitatis in tres, Septimanas nisi a 27 June, prius venerit*, which is the day after the day in Bank which was mistaken for a *die Sancti Michaelis*, it shall not be amended.”

It is interesting to observe, that at one end of the island a panel means twelve perplexed agriculturists, who after having taken an oath to act according to their consciences, are starved till they are of one mind on some complicated question; while at the other end, the same term applies to the criminal on whose conduct they are going to give their verdict. It would be difficult to decide which is the more happy application; but it must be admitted that we are a great way behind the South in our power of selecting a nomenclature immeasurably distant in meaning from the thing signified. We speak of a bond instead of a mortgage, and we adjudge where we ought to foreclose. We have no such thing as chattels, either personal or real.<sup>8</sup>

7. [The author does not tread on very firm ground in the field of English legal terminology, but the reader is left to make his own corrections.—Ed.]

8. A late venerable practitioner in an humble department of the law, who wanted to write a book, and was recommended to try his hand at a translation of Latin law-maxims as a thing much wanted, was considerably puzzled with the maxim, “*Catella realis non potest legari*,” nor was he quite relieved when he turned up his Ainsworth and found that *catella* means “a little puppy.” There was nothing for it, however, but obedience, so that he had to give currency to the remarkable principle of law, that “a

If you want to know the English law of book-debts, you have to look for it under the head of Assumpsit in a treatise on Nisi Prius; while a lawyer of Scotland would unblushingly use the word itself, and put it in his index. So, too, our bailments are merely spoken of as bills, notes, or whatever a merchant might call them. Our garnishee is merely a common debtor. Baron and feme we call husband and wife, and coverture we term marriage.

Still, for the honor of our country, it is possible to find a few technicalities which would do no discredit to our neighbors. Where one of them would bring a habeas corpus—a name felicitously expressive, according to the English method of civil liberty—an inhabitant of the North, in the same unfortunate position, would take to running his letters. We have no turbary, or any other easement, but to compensate us we have thirlage, outsucken multures, insucken multures, and dry multures; as also we have a sowmen and rowmen, as any one who has been so fortunate as to hear Mr. Outram's pathetic lyric on that interesting servitude, will remember in conjunction with pleasing associations. To do the duty of a *Duces Tecum* we have a diligence against havers. We have no *capias ad faciendum* (abbreviated *cap ad fac*), nor have we the *feri facias*, familiarly termed *fi fa*, but we have perhaps as good in the *in meditatione fugae* warrant, familiarly abbreviated into fugie, as poor Peter Peebles<sup>9</sup> termed it, when he burst in upon the party assembled at Justice Foxley's exclaiming, "Is't here they sell the fugie warrants?"<sup>10</sup>

I am not sure but, in the very mighty heart of all legal formality and technicality—the Statutes at Large—some funny things might be found. The best that now occurs to the memory is not to be

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genuine little whelp can not be left in legacy." He also translated "*messis sequitur sementem*," with a fine simplicity, into "the harvest follows the seed-time;" and "*actor sequitur forum rei*," he made "the agent must be in court when the case is going on." Copies of the book containing these gems are exceedingly rare, some malicious person having put the author up to their absurdity.

9. [In Sir Walter Scott's "Redgauntlet."—Ed.]

10. There are two old methods of paying rent in Scotland—Kane and Carriages; the one being rent in kind from the farmyard, the other being an obligation to furnish the landlord with a certain amount of carriage, or rather cartage. In one of the vexed cases of domicile, which had found its way into the House of Lords, a Scotch lawyer argued that a landed gentleman had shown his determination to abandon his residence in Scotland by having given up his "kane and carriages." It is said that the argument went further than he expected—the English lawyers admitting that it was indeed very strong evidence of an intended change of domicile when the laird not only ceased to keep a carriage, but actually divested himself of his walking-cane.

brought to book, and must be given as a tradition of the time when George III was king.

Its tenor is, that a bill which proposed, as the punishment of an offense, to levy a certain pecuniary penalty, one half thereof to go to his Majesty and the other half to the informer, was altered in committee, in so far that, when it appeared in the form of an act *the punishment* was changed to whipping and imprisonment, *the destination* being unaltered.

It is wonderful that such mistakes are not of frequent occurrence when one remembers the hot hasty work often done by committees, and the complex entanglements of sentences on which they have to work. Bentham was at the trouble of counting the words in one sentence of an Act of Parliament, and found that, beginning with "Whereas" and ending with the word "repealed," it was precisely the length of an ordinary three volume novel. To offer the reader that sentence on the present occasion would be rather a heavy jest, and as little reasonable as the revenge offered to a village schoolmaster who, having complained that the whole of his little treatise on the Differential Calculus was printed bodily in one of the earlier editions of the Encyclopædia Britannica (not so profitable as the later), was told that he was welcome, in his turn, to incorporate the Encyclopædia Britannica in the next edition of his little treatise.

In the supposition, however, that there are few readers who, like Lord King, can boast of having read the Statutes at Large through, I venture to give a title of an Act—a title only, remember, of one of the bundle of acts passed in one session—as an instance of the comprehensiveness of English statute law, and the lively way in which it skips from one subject to another. It is called,—

"An act to continue several laws for the better regulating of pilots, for the conducting of ships and vessels from Dover, Deal, and the isle of Thanet, up the River Thames and Medway; and for the permitting rum or spirits of the British sugar plantations to be landed before the duties of excise are paid thereon; and to continue and amend an Act for preventing fraud in the admeasurement of coals within the city and liberties of Westminster, and several parishes near thereunto; and to continue several laws for preventing exactions of occupiers of locks and weirs upon the River Thames westward; and for ascertaining the rates of water-carriage upon the said river; and for better regulation and government of seamen in the merchant service; and also to amend so much of an

Act made during the reign of King George I, as relates to the better preservation of salmon in the River Ribble; and to regulate fees in trials and assizes at nisi prius," &c.

But this gets tiresome, and we are only half way through the title after all. If the reader wants the rest of it, also the substantial Act itself, whereof it is the title, let him turn to the 23d of Geo. II. chap. 26.

No wonder, if he anticipated this sort of thing, that Bacon should have commended "the excellent brevity of the old Scots acts." Here, for instance, is a specimen, an actual statute at large, such as they were in those pigmy days:—

"Item, it is statute that gif onie of the King's lieges passes in England, and resides and remains there against the King's will, he shall be halden as Traiter to the King."

Here is another, very comprehensive, and worth a little library of modern statute-books, if it was duly enforced:—

"Item, it is statute and ordained, that all our Sovereign lord's lieges being under his obeisance, and especially the Isles, be ruled by our Sovereign lord's own laws, and the common laws of the realm, and none other laws."

The Irish statute-book opens characteristically with "An Act that the King's officers may travel *by sea* from one place to another within *the land* of Ireland." And further on we have a whole series of acts, with a conjunction of epithets in their titles which, at the present day, sounds rather startling, "for the better suppressing Tories, Robbers, and Rapparees, and for preventing robberies, burglaries, and other heinous crimes." The classes so associated having an unreasonable dislike of being killed, difficulties are thus put in the way of those beneficially employed in killing them, insomuch that they, "upon the killing of any one of their number, are thereby so alarmed and put upon their keeping, that it hath been found impracticable for such person or persons, to discover and apprehend, or kill any more of them, whereby they are discouraged from discovering and apprehending or killing," and so forth. There is a strange and melancholy historical interest in these motley enactments, since they almost verbatim repeat the legislation about the Highland clans passed a century earlier by the Lowland Parliament of Scotland.

To one shelf of the law library, however, an interest attaches which few are ready to deny—that devoted to the literature of Criminal Trials. It will go hard indeed, if, besides the reports of

mere technicalities, there be not here some glimpses of the sad romances which lie at their heart; and at all events, when the page passes a very slight degree beyond the strictly professional, the technicalities will be found mingled with abundant narrative. The State Trials, for instance—surely a lawyer's book—contains the materials of a thousand romances; nor are all these attached to political offenses; as, fortunately, the book is better than its name, and makes a virtuous effort to embrace all the remarkable trials coming within the long period covered by the collection. Some assistance may be got, at the same time, from minor luminaries, such as the Newgate Calendar—not to be commended, certainly, for its literary merits, but full of matters strange and horrible, which, like the gloomy forest of the Castle of Indolence, “send forth a sleepy horror through the blood.”

There are many other books where records of remarkable crimes are mixed up with much rubbish, as *The Terrific Register*, *God's Revenge against Murder*, a little French Book called *Histoire Générale des Larrons* (1623), and if the inquirer's taste turn towards maritime crimes, the *History of the Bucaniers*, by Esquemeling. A little work in four volumes, called *The Criminal Recorder*, by a student in the Inner Temple, can be recommended as a sort of encyclopædia of this kind of literature. It professes—and is not far from accomplishing the profession—to give biographical sketches of notorious public characters, including “murderers, traitors, pirates, mutineers, incendiaries, defrauders, rioters, sharpers, highwaymen, footpads, pickpockets, swindlers, housebreakers, coiners, receivers, extortioners, and other noted persons who have suffered the sentence of the law for criminal offences.” By far the most luxurious book of this kind, however, in the English language, is Captain Johnston's *Lives of Highwaymen and Pirates*. It is rare to find it now complete. The old folio editions have been often mutilated by over use: the many later editions in octavo are mutilated by design of their editors; and, for conveying any idea of the rough truthful descriptiveness of a book compiled in the palmy days of highway robbery, they are worthless.

All our literature of that nature must, however, yield to the French *Causes Célèbres*, a term rendered so significant by the value and interest of the book it names, as to have been borrowed by writers in this country to render their works attractive. It must be noted as a reason for the success of this work, and also of the German collection by Feuerbach, that the despotic Continental

method of procedure by secret inquiry affords much better material for narrative than ours by open trial. We make, no doubt, a great drama of criminal trial. Everything is brought on the stage at once, and cleared off before an audience excited so as no player ever could excite; but it loses in reading; while the Continental inquiry with its slow secret development of the plot, makes the better novel for the fireside.

There is a method by which, among ourselves, the trial can be imbedded in a narrative which may carry down to later generations a condensed reflection of that protracted expectation and excitement which disturb society during the investigations and trials occasioned by any great crime. This is by "illustrating" the trial, through a process resembling that which has been already supposed to have been applied to one of Watt's hymns. In this instance there will be all the newspaper scraps—all the hawker's broadsides—the portraits of the criminal, of the chief witnesses, the judges, the counsel, and various other persons—everything in literature or art that bears on the great question.

He who inherits, or has been able to procure a collection of such illustrated trials, a century or so old, is deemed fortunate among collectors, for he can at any time raise up for himself the spectre, as it were, of the great mystery and exposure that for weeks was the absorbing topic of attraction to millions. The curtains are down, the fire burns bright—the cat purrs on the rug; Atticus, soused in his easy chair, can not be at the trouble of going to see Macbeth or Othello—he will sup full of horrors from his own stores. Accordingly he takes down an unseemly volume, characterized by a flabby obesity by reason of the unequal size of the papers contained in it, all being bound to the back, while the largest only reach the margin. The first thing at opening is the dingy pea-green-looking paragraph from the provincial newspaper, describing how the reapers, going to their work at dawn, saw the clay beaten with the marks of struggle, and following the dictates of curiosity, saw a bloody rag sticking on a tree, the leaves also streaked with red, and, lastly, the instrument of violence hidden in the moss, next comes from another source the lamentations for a young woman who had left her home—then the excitement of putting that and that together—the search, and the discovery of the body. The next paragraph turns suspense into exulting wrath: the perpetrator has been found with his bloody shirt on—a scowling, murderous villain as ever was seen—an eminent poacher, and fit



for anything. But the next paragraph turns the tables. The ruffian had his own secrets of what he had been about that night, and at last makes a clean breast. It would have been a bad business for him at any other time, but now he is a revealing angel, for he noted this and that in the course of his own little game, and gives justice the thread which leads to a wonderful romance, and brings home desperate crime to that quarter where, from rank, education, and profession, it was least likely to be found. Then comes the trial and execution; and so, at a sitting, has been swallowed all that excitement which, at some time long ago, chained up the public in protracted suspense for weeks.

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## EDITORIAL NOTES

### REQUIRING PROPER PROOF THAT APPLICANTS FOR ADMISSION TO THE BAR HAVE HAD THE REQUIRED PRELIMINARY EDUCATION

For several years the Illinois State Bar Association has adopted reports of its committee on legal education urging upon the Bar Examiners and the Supreme Court of Illinois the importance of ascertaining in a thoroughly trustworthy way that each applicant for admission to the bar has had the proper preliminary

education, but the State Bar Association's action has as yet had no result. The importance of the preliminary education requirement is demonstrated in two of the latest judicial pronouncements in other states on the subject, namely in *In re Bergeron*, 220 Mass. 472, 107 N. E. 1007, and *In re K.*, 88 N. J. Law 157, 98 Atl. 668. As was said in the New Jersey case:

"A candidate for the bar is not deemed qualified to begin his legal studies of three years unless and until he is shown to have a satisfactory education as a foundation for them. Otherwise the seeds of legal learning are sown on a barren soil." (88 N. J. Law at p. 158, 98 Atl. at p. 669).

That this is so the Supreme Court of Illinois has acknowledged by framing its rules for admission to the bar to provide that

"Every applicant, except those who apply for admission by virtue of admission in another state or foreign country, shall present to the Board of Law Examiners satisfactory proof, in writing, by examination or otherwise, as the board may direct, that he has had a preliminary general education *acquired prior to beginning the study of law*, equivalent to that of a graduate of a four-year course high school in this state," etc.

The Supreme Court and its Board of Law Examiners should not hesitate longer to take the needed step of requiring the right kind of evidence that its rule is being complied with, especially when that evidence can be compelled without subjecting the applicants for admission to any burden of which they can reasonably complain. The suggestion of the committee on legal education, endorsed by the Illinois State Bar Association, is that the Supreme Court and its Board of Bar Examiners should receive as proof of the preliminary general education of applicants for admission to the bar only such certificates as are accepted or issued by the University of Illinois. That would mean that no individual certificate of a school principal or school superintendent would be accepted as such proof. It would also mean that no school certificate would be accepted unless the school was on the liberal list of accredited high schools of the University of Illinois. It would further mean that applicants who obtained their preliminary education at a high school not on that accredited list, or obtained it in irregular ways, would have to pass examinations set by the State University. Such examinations could be furnished at appropriate times and places, however, and at a nominal fee, so that no real burden would be thrown on applicants. The proposed system would make it absolutely certain that applicants who did not have the prescribed minimum of preliminary education would not take

the bar examinations. Such a consummation is greatly to be desired. The best evidence that applicants have had the requisite preliminary education should be exacted.

G. P. C., Jr.

#### NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The report of the twenty-sixth annual meeting of the National Conference of Commissioners on Uniform State Laws, held in Chicago, August 23-29, 1916, has come from the press but recently.

Its contents are interesting as showing the careful organization of this important body and its methods of work.

The exhaustive study of uniform state laws and the history of the National Conference of Commissioners by Nathan William MacChesney, Esq., president of the Illinois Commission on Uniform State Laws, which he made the subject of his annual address as president of the Illinois State Bar Association on June 1, 1916, makes any extended reference to the origin, growth and development of the movement to bring about uniformity of legislation among the various states of the union unnecessary. Suffice it here to say that the roll of membership for the year 1916, shows that the states, territories and possessions under the flag of the United States to the number of fifty-three are represented by commissioners, usually three in number. They have perfected an organization well adapted for special study and practical work. The officers consisting of a president, vice-president, secretary and treasurer, together with five members appointed by the president, form a standing executive committee. Twenty-one special committees on subjects appropriate for the Conference, are also at work.

The time of the Conference during the session of 1916 was in the main devoted to the consideration of a Uniform Land Registration Act, a Limited Partnership Act, an Act for Extradition for Persons of Unsound Mind, a Fraudulent Conveyances Act, and a Conditional Sales Act. Of these the first three were completed and commended to the various legislatures for adoption. It will be of interest to consider their provisions.

*Uniform Land Registration Act.* This act was drafted originally by Eugene C. Massie, Esq., one of the commissioners from Virginia. Mr. Massie gave some years of patient study and research in preparation of this work, making a careful examination of the systems based upon the Torrens Act, now in operation in Massachusetts, Illinois, and elsewhere. The act as drafted, with various

amendments and changes, was approved by the Conference held at Salt Lake City, 1915. Power was given the committee, however, to make verbal changes without affecting the substance. Such changes having been made were reported to the Conference and ratified. The act provides that such courts as may be designated by the state shall be constituted Courts of Land Registration with exclusive jurisdiction, subject to right of appeal of all proceedings for the registration of titles to lands and of all proceedings affecting such titles. All trials shall be before the court, excepting that on motion of any person interested, an issue shall be framed to be tried by jury. All proceedings are *in rem* against the land and registered transactions operate directly upon the land and vest and establish title thereto. The court is given power to make general rules of practice procedure, and appeals are provided for. The clerks of the courts are made registrars of title. These officers are authorized to issue process and to enter the decrees of the court touching lands in their respective counties or cities; to issue certificates of title; to make entries and perform all acts of registration; to keep accounts and generally to perform such acts as the court may prescribe to them. The court shall appoint one or more attorneys-at-law as examiners of title, or on motion appoint special examiners. The duties of the examiners are to search the records and investigate the facts stated in the petition or otherwise brought to their notice in any case referred to them. They have the powers of Commissioners in Chancery and may hear the parties and receive evidence. They report to the court a certificate of their examination of title and findings of fact.

In order to obtain registration the person claiming title to own or to have the power of appointing or of disposing of an estate in fee simple in any land, whether subject to liens or not, must begin his suit by a petition to the court. Persons under disability may sue and defend as in other courts, but the person on whose behalf the petition is made must always be named as petitioner, and a non-resident petitioner must appoint a resident agent upon whom process and notice may be served. The general rules of chancery in equitable actions are provided for. The petition, which must be sworn to, must set forth a full description of the land and improvements thereon, and valuation for taxation; when, and how, and from whom it was acquired; whether or not it is occupied; an enumeration of all known liens, interests, and claims; and the full names and addresses, if known, of all persons who may be inter-

ested by marriage or otherwise, including adjoining owners and occupants. The petition, after filing, is forthwith docketed and recorded for notice of *lis pendens*. All other pleadings and papers are docketed and numbered. Upon the filing of a petition it is to be referred to one of the examiners of title, whose report shall include an abstract of title of the land; full extracts from the records to enable the court to decide the questions involved; the names and addresses of all persons interested in the land so far as ascertained, as well as adjoining owners and occupants, showing their separate interests, and indicating upon whom and in what manner process should be served or notice given in accordance with the provisions of the act. Upon the filing of the report of the examiner of titles, the court shall cause notice thereof to all persons shown therein to be entitled and "to all whom it may concern" to be published and posted in the county or city where the land lies. Notice by registered mail shall be sent to every person interested and named in the petition, or in the report of the examiners of titles, whose address is given or known, and an attested copy of the order shall be posted on the land. It is the duty of the sheriff to ascertain the names and addresses of persons actually occupying the land under any claim of title. If the petition involves the termination of any public rights or interests, notice must be given to the proper attorney for the state, city or county, and in addition the court may cause other notice in such manner as it may deem proper. Personal certificates of process, as is required in equitable actions, shall be made upon a resident of the state, unless that certificate be waived by appearance or otherwise. Notice served in accordance with the provisions of the act is final and conclusive.

Provisions are made for certificates showing execution of order of publication, time for hearing; and the appointment of guardians *ad litem*. Any one having any interest in or claim against the land, whether named in the petition and in the order of publication or not, may appear and file an answer at any time before final decree.

After the report of the examiner of titles is filed, the court may proceed to take proper action. At any time before final decree the court may require land to be surveyed and the plat filed among the papers of the suit.

Provision is also made for amendments to the pleadings and for payment of taxes. The court may, after final hearing, enter a

decree of registration which will have the effect of binding the land and quieting the title thereto. When title has been duly registered, it constitutes an original certificate. Subsequent certificates covering the same land shall be in like form. Provision is made for registration of titles and the issue of certificates. Certificates of title are conclusive evidence of all matters contained therein, except as otherwise provided.

Whenever the whole of any registered estate is transferred, the transaction shall be duly noted and registered. The certificate of title and any duplicate certificate shall be cancelled by the registrar, and a new certificate and duplicates issued as the case may require. If only a portion of the estate is transferred, or it be encumbered or leased for more than one year, the transaction shall be noted and registered and new certificates issued. All registered encumbrances shall be noted upon the outstanding certificate until they have been released or terminated. In voluntary transactions the duplicate certificate of title must be presented with the instrument filed for registration, and registry shall be made upon proof of payment of all delinquent taxes.

In involuntary transactions a certificate properly made out, or a certified copy of the order of any court of competent jurisdiction shall be authority for registry of the transaction under direction of the court. Instruments dealing with equitable interests in land may be registered. When duplicate certificates do not accompany writings for registration, the registrar is authorized to request production thereof, which may be enforced by process of court.

Registered lands, upon the death of the owner, go to his personal representative as personal estate, but the course of ultimate descent under the statutes and the right of dower and courtesy, when duly registered, are not affected, nor the order in which real and personal assets are applicable in the payment of expenses, deaths or legacies, nor the liability of real estate to be charged with the payment of debts and legacies. Such real estate shall be held by the personal representative of the deceased owner as trustee of those beneficiaries entitled thereto.

Registration is made of delinquent taxes and levies, and of sales for such liens, as well as of redemption. When sales for taxes are held the proceeds of the sale are to be distributed as specified. The title of a tenant for life or in reversion shall not be divested by a sale for non-payment of taxes by a life tenant.

Any registered owner or other person having a claim arising

from causes other than fraud or forgery, may petition the court for relief within ninety days after the cause of complaint has arisen.

When a duplicate certificate of title is lost or destroyed, the owner may petition the court for the issuance of a new one.

Every transaction which, if recorded, would affect unregistered land, shall, if duly registered, be notice to all parties from the time of such registration.

Every registered owner shall hold his land free from any adverse claims except liens arising under the laws of the United States, not required to be recorded under state law, taxes not delinquent, any lease for a term not exceeding one year under which the land is actually occupied. Cases of fraud and forgery are excepted. Such registry may be set aside by the court, but the rights of an innocent intervening registered encumbrancer or purchaser for value shall not be affected thereby. A decree of registration shall be construed as an agreement running with the land. No right in derogation of the registered owner can be acquired by prescription or adverse possession. An assurance fund arises from the payment of one-tenth of one per cent of the assessed value of all registered land. Any person who had no actual notice of registration and is without other remedy may bring action against this fund within two years after his right of action has accrued.

The act shall not apply to land until it be so determined by an election of the city or county where it is intended to operate.

This act has been adopted in Virginia.

*Act to Provide for the Extradition of Persons of Unsound Mind and to Make Uniform the Laws of the States which Enact the Same.* This act was drafted by George Whitelock, a commissioner for Maryland. It was under consideration at two annual sessions of the Conference. It provides that when a person alleged to be of unsound mind has fled from any state where he was under detention by law in a hospital, asylum, or other institution for the insane, or has been legally adjudged insane, or was subject to detention in that state, being then his legal domicile, is found in this state, he shall be delivered up on demand of the executive authority of the state from which he fled, upon the observance of certain carefully specified rules of procedure. As yet no state has adopted this act, but certain glaring instances have indicated very strongly the need of it. This act has been introduced by bill in the Illinois General Assembly.

*Uniform Limited Partnership Act.* This act was drafted by William Draper Lewis of Philadelphia. In a preliminary note he



says that the first Limited Partnership Act was adopted in New York in 1822. Most of the states which have such acts have followed the New York act with little material alteration. These statutes were adopted and to a considerable degree interpreted by the courts in that period, when it was generally held that any interest in business should make the person holding the interest liable for its obligations. As a result the courts usually assume in the interpretation of these statutes two principles as fundamental:

"First. That a limited (or as he is also called a special) partner is a partner in all respects like any other partner, except, that to obtain the privilege of a limitation on his liability, he has conformed to the statutory requirements in respect to filing a certificate and refraining from participation in the conduct of the business.

"Second. The limited partner, on any failure to follow the requirements in regard to the certificate or any participation in the conduct of his business, loses his privilege of limited liability and becomes, so far as those dealing with the business are concerned, in all respects a partner.

"The fact that one may now lend money to a partnership and take a share in the profits in lieu of interest without running serious danger of becoming bound by partnership obligations, has to a very great extent deprived the existing statutory provisions for limited partners of any practical usefulness. Indeed, apparently their use is largely confined to associations in which those who conduct the business have not more than one limited partner."

The draft was made by Dr. Lewis on the assumption that public policy does not require that one who contributes to a business and receives compensation for his capital by way of interest in the profits and exercises to some extent control of the business, should be bound for the obligations of the business; and that while those in business remain unlimitedly liable for business contracts, they should have the right to associate others who contribute capital and acquire rights of ownership in the business, provided such associates do not compete with creditors in the distribution of partnership assets.

The title of the act as first drafted was an Act Relating to Partnerships with Contributing Members, because the person who contributes the capital is not in any sense a partner, but rather a member of the association. After much debate, however, the Conference concluded to change the title and retain the accepted term for such contributors, although it is not in itself strictly correct.

The greatest objection to existing limited partnership acts is the strict requirements of compliance with the technical letter of

the statute under penalty of unlimited liability. In the present act it is expressly provided that the association is formed when there has been substantial compliance, in good faith, with its requirements. While failure to comply with the requirements for a certificate may result in the non-formation of the association, it does not make the contributor a partner, provided he renounces his interest in the profits of the business on ascertaining the mistake.

A limited partner may become a partner and yet may retain his rights as a limited partner. Such a person has in respect to his contribution the same rights as if he were not a general partner.

The limited partner may loan money or have other business transactions with the partnership; but he cannot receive or hold as collateral security any partnership property, or any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge the partnership liabilities to persons not claiming as general or limited partners.

The substitution, withdrawal, or addition of new limited partners does not necessarily dissolve the association. No limited partner can withdraw his contribution till all liabilities to creditors are paid.

The liabilities of limited partners are to the partnership, not to creditors; but the general partners cannot waive liability in the partnership to the prejudice of creditors.

The argument of Commissioner MacChesney on the value of names as trade assets induced the committee in charge of the act to change its first attitude as to the use of the name by which limited partnerships should be known. As now drawn, the surname of a limited partner may not appear in the partnership name, unless it is also the name of a general partner, or prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

Such are the salient points of the act substantially as stated by the draftsman in his introductory note. While it is not necessary for the states which adopt this act to repeal existing limited liability acts, the advantages presented by it are thought to be so marked that existing limited partnerships will change their certificates to conform to it, and the other acts will be repealed as unnecessary and likely to produce confusion.

*Act Relating to Fraudulent Conveyances.* This act reached its second tentative stage after being considered section by section in the Conference. The draft has been drawn with a view to cover cases of conveyances in fraud of creditors, as applied to sole traders,

partnerships, corporations, and other associations, whether such associations are business or non-business associations. Dr. William Draper Lewis, who has done so much valuable work for the Conference, has been employed as draftsman. He is now engaged in the preparation of a second tentative draft embodying the results of the criticisms raised during the debates in Conference, which will be completed and submitted at the next session of the Conference.

*Conditional Sales Act.* Much interest is centered in the Uniform Conditional Sales Act which received in its tentative stage the attention of the Conference during several sessions. The draftsman, Professor George G. Bogert, of the Cornell law faculty, presented a thoroughly annotated form of act with reference to the existing laws on the subject in all of the states, the Canadian provinces, and England. The proposed act is embodied in twenty-eight sections.

The term "conditional sale" as used in the act has been tentatively defined as meaning (1) "any contract for the sale of goods by which possession is to be delivered to the buyer prior to the passage of the property in the goods to the buyer, and by which the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and the bailee or lessee is to become or is to have the option of becoming, or is obligated to become, the owner of such goods upon full compliance with the terms of the contract."

The act provides that no conditional sale shall be valid against subsequent purchasers, mortgagees or pledgees, or against creditors whose rights accrue subsequent to such sale, unless the contract be in writing and be filed as prescribed. Much discussion and some sharp divisions of opinion arose in the Conference, and no doubt reflected local views on the subject of the rights arising upon default in payment or performance of other conditions by the buyer. The act provides that under such circumstances the seller may re-take possession whether the right is expressly reserved to him or not. This elementary right is restricted, however, by giving to the buyer a right of redemption, and requiring that the goods be retained in the filing district for thirty days to allow for its exercise. If the buyer does not redeem within thirty days, the seller

shall sell the goods at public auction in the filing district, not more than forty-five days after re-taking, after giving ten days notice to the buyer. Any deficiency after payment of expenses between the proceeds of the sale and the balance due upon the purchase price may be recovered from the buyer, or from any one who succeeds to his obligations. This is a crucial provision. It follows the theory of chattel mortgages. Mr. Bogert says:

"The result produced by this section has been reached in a number of cases: *Matteson v. Equitable M. & M. Co.*, 143 Cal. 436; *Kinney v. Avery & Co.*, 80 S. E. (Ga.) 663; *Christie v. Scott*, 94 Pac. (Kans.) 214; *Dederick v. Wolfe*, 63 Miss. 500; *McCormick Mach. Co. v. Koch*, 8 Okla. 374; *Arcue v. C. Aultman & Co.*, 2 Willson (Tex.) 947. While an action for the entire price due has often been considered inconsistent with a re-taking of the goods, a re-taking of the goods ought not to be considered as an election to trust to the goods alone for the recovery of the price. The re-taking constitutes an election to look to the security given by the buyer for the payment of the price. After resort to that primary source of payment, the seller ought to be allowed to proceed to the secondary source, the promise of the buyer to pay. If the buyer is given a right to recover the surplus on the re-sale, the seller must be allowed to recover his full purchase price."

Following out this theory, the seller may sue for the whole or any installment of the purchase price as it becomes due. If he should sue, he may still re-take the goods.

The subject dealt with is of much importance. The committee on commercial law is now engaged with Professor Bogert in dealing with the criticisms that have been offered by those best qualified to pass upon the merits of the tentative draft. A second draft embodying the results of this study will be presented at the next annual meeting of the Conference, which is to be held at Saratoga Springs, New York, August 29th-September 3rd.

The officers elected by the Conference are Hon. William H. Staake, of Philadelphia, Pa., president; Stephen H. Allen, of Topeka, Kansas, vice-president; W. O. Hart, of New Orleans, La., treasurer; George B. Young, Montpelier, Vt., secretary.

Although the Conference has had to proceed on very economical lines in the past years, its support being drawn from appropriations by the American Bar Association, certain state bar associations, and contributions by some of the states, its work has now received such wide recognition that it has become a national institution. The meeting of 1916 was among the most successful of its history and a happy augury of a future of constantly increasing usefulness.

WALTER GEORGE SMITH.

## COMMENT ON RECENT CASES

**INHERITANCE TAX—APPLICATION OF SECTION 25 TO LIFE ESTATES.**—In *People v. Starring*, 274 Ill. 289, and *People v. Donahue*, 276 Ill. 88, the Supreme Court of Illinois has passed upon questions in regard to the application of section 25 of the Illinois Inheritance Tax Law somewhat differently from those covered in previous decisions. Section 25 provides, in substance, that when the final disposition of a decedent's property depends upon future contingencies, the succession to such property may be presently taxed upon the assumption that the contingency allowing the highest tax will occur. It is clear from the cases of *People v. Byrd*, 253 Ill. 223, and *People v. Freese*, 267 Ill. 164, that when property is to be distributed at some future time to a class of persons, however numerous, it may be presumed that any number of such persons will die and that the entire property will pass to a single survivor.

In *People v. Starring*, *supra*, property was left in trust for twenty years with provision for payment of the income to several beneficiaries, but if they should all die the trust was to end, and the property be immediately paid over to the remainderman. The lower court assumed that all these beneficiaries would die in five years, allowed deduction for their estates as estates for five years, and taxed the remainder accordingly. In affirming this judgment the Supreme Court said (page 293):

"By following the true intent and purpose of section 25 in fixing the tax in this case, the court should have assumed that the death of the brother and two sisters of the testatrix would occur immediately. By assuming that their deaths would not occur until five years after the death of the testatrix and in charging them with seven-ninths of the income from the trust estate for that period, appellants were given a benefit to which they were not entitled and they cannot complain of this action of the court."

The argument for the beneficiaries was that they were in substance given life estates, but with a provision limiting such estates to twenty years at the longest, and that the value of the remainder should have been determined by deducting the value of such estates computed according to mortality tables. If given life estates their interests would be plainly within section 2 of the Inheritance Tax Law, and valuation by mortality tables would be proper. The Supreme Court answered this argument by saying that they were *not* given life estates but were given the income for twenty years, unless the estate was sooner terminated by some future contingency, and that such contingency was within the meaning of section 25 and could be assumed to occur at such time as would result in the largest tax.

In *People v. Donahue*, *supra*, life estates were given to six children of the testator, which were admittedly taxable under section 2, and the values, as computed from mortality tables, were subtracted from the total estate in taxing the remainder. It was contended that certain other estates given to nine grandchildren were vested estates, and that they should also be taxed under section 2 and deduction made from the remainder accordingly. The court

held that such estates were all subject to be defeated by certain contingencies; that it could accordingly be presumed under section 25 that such contingencies would happen; and that in taxing the remainder there could therefore be no deduction for the value of these estates. In discussing whether these estates should be taxed as life estates under section 2 or as contingent estates under section 25, the court said (page 514):

"Said section 2 as it now reads, and said section 25, were passed as a part of the same act in 1909: Laws of 1909, p. 312. Obviously, they should be construed together, in connection with the rest of the act, to find the meaning of both. So construed, we do not think there is any conflict between the two sections. Thus read, section 2 requires that a life estate, depending upon no condition or contingency, shall be appraised and its value fixed upon mortality tables immediately after the death of the decedent, but if said life estate depends on any contingency or condition, then the provisions of section 25 apply.

"Counsel for appellants argues at length that these life estates of the nine grandchildren are vested, and therefore they should be valued, and the remainder reduced to that extent. That is not in accord with the provisions of said section 25. Said section, in effect, requires that any estate which depends upon a condition or contingency, *whether the estate is vested or contingent*, shall be controlled by the provisions of said section 25 in levying the inheritance tax. *Said section 25 applies to vested estates when they are liable to be defeated, extended or abridged* by the conditions or contingencies provided in a will. Even if it be conceded that the nine grandchildren did take vested estates, clearly, under the wording of the will, all of such estates were liable to be divested by conditions or contingencies that might arise after the death of the decedent."

This decision is in accord with *People v. Starring*, and the cases together are important in showing a tendency to confine the application of section 2 to life estates which are strictly within its terms, and because of the express statement that the application of section 25 does not depend upon whether or not the estate in question is vested. This statement is of great importance because there are many states which, while vested within the rules of the common law, are nevertheless subject to be defeated by some future contingency. *People v. Donohue*, holds squarely that section 25 is applicable to such estates. It is not the legal name of an estate but the actual facts and possibilities in regard to it which must be considered in applying section 25.

This view is slightly inconsistent with the earlier case of *People v. Freese*, 267 Ill. 164, where the court held that an estate was taxable as a life estate although given with the provision that the beneficiary could "use the same as she shall desire and that what remains after her death shall go to the nearest of my kin living at the time of her death." The reason given for that decision was that such a provision—allowing the first taker to consume the entire estate—did not raise the estate from a life estate to a fee. In other words, the tax was made to depend upon the *legal name of the estate* and not upon the *actual possibilities*. That decision was criticized in X ILLINOIS LAW REVIEW 301, and the suggestion made that an estate which might be *extended* by some future contingency, was directly within the language of section 25 and should have been taxed as if given outright. *People v. Donohue* is closely analogous except that

here the possibility was that the life estates instead of being *extended* should be *defeated* by future contingencies. If a possible cutting off of the estate prevents it being a life estate, or, rather, makes it taxable under section 25 whether regarded as a life estate or not, its possible enlargement to the value of the entire property should do so also. The rule in *People v. Donohue* seems clearly correct, and while it cannot be said to overrule *People v. Freese*, it certainly throws some doubt on the correctness of the reasoning in that case.

C. B.

**PLEDGE OF STOCK CERTIFICATES.**—The case of *Allmon v. Salem Building Assn.*, 275 Ill. 336, represents a further development of the law of stock transfers which began with the amendment to the statutes on judgments passed in 1883 as interpreted in *Rice v. Gilbert*, 173 Ill. 348. This statute provides that shares of stock may be taken on execution; but that where such shares have been sold or pledged in good faith for value and the certificate delivered they shall not be taken on execution except for their value over the amount of the pledge. In *Rice v. Gilbert*, *supra*, a bill was filed by a pledgee of stock (not transferred on the books of the company) to restrain execution under a judgment at law against the pledgor. The court held that this was the situation which was contemplated by the statute, and that whereas before the statute the judgment creditor would have been preferred the pledgee took precedence by virtue of the statute.

Then in *Allmon v. Salem Building Assn.*, *supra*, the question arose on pledged shares of stock, in a building association, which had a time for maturity. The shares were pledged by delivery of the certificates but without a transfer on the books, and the pledgor secured payment to himself of the stock on its maturity without producing his certificates. The by-laws of the association provided for transfer of shares only on the books. The association had no notice of the pledge and the pledgee had no notice of the pledgor's application for payment of the shares. The question, therefore, was squarely presented as to whether as between the company and the pledgee of this character of stock, a transfer made by way of pledge without complying with the by-laws on transfers and without notice to the corporation is valid as between the pledgee and the company.

It is in general the law in this state that where the by-laws require transfer on the books, yet as between transferror and transferee, a transfer of stock not made on the books but evidenced by the delivery of the certificate is valid; but that as between such transferee (or pledgee) and the company a different rule prevails, and until the transfer is made on the books a holder of a certificate cannot assert a legal title against the company: (*Rice v. Gilbert*, *supra*). But the *Allmon* case has made an exception to this general rule and held that the pledgee was protected even as against the company.

The statute above mentioned was adopted to make the law more

consistent with commercial usage, and the opinion in *Rice v. Gilbert*, *supra*, brought out this point, and it is also mentioned in the *Allmon* case. But the *Allmon* case is founded upon the proposition that since it is the duty of the company to require transfers on its books, and to compel the production of stock certificates in all such cases, it is also its duty to compel the production of a stock certificate before "cashing" it. And the opinion recognizes the fact that a transferee not on the books need not be recognized as a member of the corporation.

Thus the *Allmon* case must be strictly limited in its application to a payment of the principal of shares of stock and not to questions as to the right to vote or to receive ordinary dividends. For any other interpretation would not only be inconsistent with the settled law but would violate the principles of commercial usage which the statute intended to make effectual.

W. B. H.

#### DRAINS BY MUTUAL CONSENT—DUTY TO KEEP IN REPAIR.—

It was seen that at common law, the dominant owner was required to keep an easement in repair. *Ballard v. Dyson*, 1 Taunt. 179 (Eng.), and this principle has been applied to the easement of drain in this state. *Murtha v. O'Heron*, 178 Ill. App. 347-354. Apparently, the reason for this rests upon the theory that easements being strictly construed and not favored, the only burden of the servient owner was a passive and not an active one.

In that condition of the law, appears the question involved in cases of drains by mutual license under the act of 1889. The recent case of *Cox v. Deverick*, 272 Ill. 46-53, Ill. N. E. 560, suggests that a distribution of the burden of repair to be governed by the facts in each particular case would be proper. The case itself sets aside the decision of the lower court in so far as it imposes the entire burden upon the servient estate, but seems to concede that the drain might be partially for the benefit of both the servient and the dominant estates, and thus, equitably, a distribution of the duty to repair ought to be made. Possibly this is correct, as in such case the servient owner is not strictly passive in interest.

E. M. L.

#### DEEDS—DELIVERY—VOLUNTARY SETTLEMENTS—

The case of *Vaughn v. Vaughn*, 272 Ill. 11, 111 N. E. 566, presents a frequent situation in the subject of delivery of deeds. Matthew Vaughn, the owner of a farm in Henderson County, and the owner of other property also, had made a partial distribution, giving all of his children a share except his son Manford Vaughn. He made a deed in the presence of one Froelich, circuit clerk, to Manford Vaughn, of the home farm. His wife joined him in the execution of this deed. Manford Vaughn then moved with his wife upon the farm, and Matthew Vaughn went to Burlington, Iowa. Manford Vaughn occupied the farm for a long time, putting in improvements and cultivating it. Manford knew of the deed before he moved to the



farm. The deed was deposited by the grantor in his safety deposit box in Burlington. Manford Vaughn had no means or right of access to the box, and the only one who did, besides the grantor, was his wife. Shortly before his death, the grantor told James Vaughn, another son, and his wife, to give the deed to Manford. The envelope in which the deed was deposited was marked with the name of the grantee.

There would seem to be no doubt that there was a delivery in this case. It has been held too many times for citation of authority that it is not necessary that there be a manual tradition of the deed from grantor to grantee. All that is necessary is that the grantee indicate by unequivocal act or word that it is his intention that the grantee shall have the land. In this case the court said that the deed, while retained within the possession of the grantor, was there for purposes of safe keeping only, and that the intention to part with control over the deed was, nevertheless, present in the mind of the grantor in such way as to make an effectual delivery.

It might have been urged in this case that this was an attempted will by deed. The instructions mentioned above were given on the death-bed of the grantor, but such instructions at that time were construed by the court to be absolute instructions, and to indicate no intention on the part of the grantor to retain any control over the property or the deed. While the original act of the grantor in keeping the deed and in placing the same in his deposit box, of itself did not prove delivery conclusively, the words of instruction coupled with other facts developed in the case certainly did.

In the case of *Walker v. Walker*, 42 Ill. 311, a father told his son, the grantee, that he held the deed in question subject to his order, and that it was at the house ready for him. In *Weber v. Christen*, 121 Ill. 91, the deed was lying in the presence of the parties, and the grantor told the grantee to take it from the table. In these cases it was held that the act of the father was a sufficient manifestation of intention to part with control. In these cases the words were spoken directly to the grantee. The same principle applies, of course, where the words are spoken to somebody else who acts as the agent of the grantor.

The court goes further than necessary to back up the foregoing conclusion in pointing out that the deed is one for a voluntary settlement. The fundamental relationship of parent and child was present, and in such case there is a presumption, which is rebuttable with difficulty only, that the parent grantor intended to part with control over the deed and make the conveyance to the child grantee.

A. S. L.

## BOOKS AND PERIODICALS

**HANDBOOK OF THE LAW OF WILLS.** By George E. Gardner. Second Edition Edited by Walter T. Dunmore. Hornbook Series. St. Paul: West Publishing Co., 1916. Pp. XIII, 641.

An altogether admirable text on wills is this volume of the Hornbook Series. The work can be unreservedly recommended to the law school student, and should find its way to the practicing lawyer's library as well. As a resumé of the law of wills it may profitably be read by instructor, practitioner, and student.

The rules of law are, as is characteristic of the Series, set forth in black-face headings with conciseness and accuracy, followed by text that indicates clearly any division in the lines of authority, the reasons for, and the underlying principles and propriety of the rules announced, the effect of statutory enactments, the trend of modern decisions, and other matters of equal interest and importance.

Though the work is concise, there has been no surrender of accuracy or fullness of exposition to space-saving. Of particular value is the care with which divergent lines of decision are distinguished and the contrasting rules set forth. The excellent arrangement of the text and the development of the subject are noteworthy, the plan followed being substantially that found in the American Digest. The footnotes, elaborated and extended by Mr. Dunmore, are good and carry much matter in aid of the text.

Of the rather numerous recent new editions of texts on the law of wills, this is to be preferred. It does not attempt to cover the law of administration beyond a discussion of the procedure and rules for probate of wills and the effect thereof. Attention may well be directed to the chapter on contracts to make wills, and to the chapters on the construction of wills.

R. Y. H.

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**THE MINISTERIAL FUNCTION OF GOVERNMENT.** *W. W. Lucas.* 28 Jurid. Rev. 389.

**THE ATTACKS ON THE COURTS AND LEGAL PROCEDURE.** *William H. Taft.* 5 Ky. L. Jour. 1.

**THE COMMON LAW.** *John E. Young.* 10 Maine L. Rev. 1.

**SHORT HISTORY OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS. PART I.** *Albert Mason.* 2 Mass. L. Q. 82.

**THE PSYCHOLOGY OF JUDGES.** *T. D. Crothers.* 33 Medico-Legal Jour. 4.

**THE ATTAINT—I.** *John M. Zane.* 15 Mich. L. Rev. 1.

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**LIABILITY OF CARRIER UNDER A BILL OF LADING WHEN THE GOODS HAVE NOT BEEN RECEIVED BY THE CARRIER.** *Howard S. Ross.* 15 Mich. L. Rev. 38.

**MARTIAL LAW AND THE ENGLISH CONSTITUTION.** *Harold M. Bowman.* 15 Mich. L. Rev. 93.

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# Legal Aid Society of Chicago

OFFICE: 31 WEST LAKE STREET

Suite: 230 Telephone Rand. 484

## OFFICERS FOR 1916

RUDOLPH MATZ.....	President
MRS. FANNY J. HOWE.....	Vice-President
JOHN H. WIGMORE.....	Vice-President
MRS. EDWARD L. STEWART.....	Recording Secretary
MISS EDITH FARGO ANDREWS.....	Corresponding Secretary
FRANCIS E. BROOMELL.....	Treasurer

Mrs. William E. Boyes, Superintendent.

Eileen H. Markley, Assistant Attorney.

George A. Berry, Jr., Assistant Attorney.

Roy K. Thomas, Assistant Attorney.

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### A LIEN ON A DEAD BODY.

Henry B is a clerk, earning \$17.00 a week, the father of twins twenty months old. His case was reported to us by his wife.

Mr. B came from New Orleans, and when in June, 1914 his aged mother died, his wish was to have her body interred in a New Orleans cemetery. Times were hard, however, and the plaintiff found that on account of the rule there that no bodies may be buried underground, the cost of burying his mother in New Orleans was prohibitive. Therefore he rented a receiving vault from the X Cemetery Co. here. From June 1914 to January 1916, he paid at the rate of \$5.00 per month for a resting place for his mother, with the understanding that if he should take the body elsewhere for final interment there would be an extra charge. He also paid \$18.00 for a grave, which money was to be refunded if a lot was purchased from the defendant.

Mr. B was quite ready to buy a lot from the defendant, but the only ones that were shown him were so expensive that it would have been impossible for him ever to finish paying for one. He looked about him and finally found a lot for a reasonable sum in another cemetery, and paid \$15.00 on it. Then the defendant in the case refused to give up the body unless the plaintiff should agree to produce another large sum of money in addition to what he

had already paid in. The plaintiff in his despair came to us.

In view of the printed form issued by the defendant, which called for only \$3.00 rent in like cases, and because of the doubt of there being a lien on a dead body, the Legal Aid Society, after telephoning various cemetery companies and undertakers, decided to start a replevin suit to recover the body.

The proper papers were procured, the plaintiff paid his court costs and the suit was in a fair way to be started when we suddenly received a message from the defendant's manager. He said that the case had taken a new turn, and that if we would send the plaintiff to him a speedy settlement could be effected.

We complied with his gentle request, and our client was able to report in a day or so that he had recovered the body of his mother for five dollars instead of the fifty that had been originally asked. He had also saved his court costs, which were returned to him.

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#### A MOTHER OUSTED BY A CARNEGIE HERO.

Away back in April, 1912 an old lady seventy years old, Mrs. C came to the Legal Aid Society in great distress of mind. She held in her hand a five day notice to move signed by one J. M. She told us that J. M. was her son's father-in-law and how he got the property she knew not, but that her son had bought the property with her money promising to take the title in both their names. Only a few months before she had discovered that the title was in his name alone, and that all her money, received from insurance on her husband's life, was gone and nothing to show for it. The story she told was this:

When her husband died in March, 1910 she received \$300 from his Union and \$1,000 from his Lodge. Her twenty-one-year-old son was the pride of her heart, and when he suggested that they get a house together she readily agreed. She gave him \$300 for the first payment and let him use the rest of her hoard as he needed it for repairs, plumbing, etc., and thus they lived happily. In June, 1910, the son, James, had stopped a run-away horse and earned a Carnegie medal; and the Carnegie medal was accompanied by a gift of \$1,700 from the Carnegie Hero Fund Commission to enable the mortgage on the home to be paid off. Shortly after this the son married a girl whose attention had been attracted to him by his deed of valor. From this time on the old lady's life was pretty miserable. The young folks found that the modest salary of \$12



a week was no longer enough to support a family. They borrowed \$1,000 on the place and then moved away and left the old lady. The next she knew she received this notice to move out; and so she came to get aid.

The Legal Aid Society promptly filed in the Recorder's office a notice of Mrs. C's claim to the property and started a bill in the Circuit Court asking for an injunction restraining Mr. M. from dispossessing the old lady. The bill further asked the court to declare Mr. M. held the property subject to a trust in favor of the old lady. The injunction was granted and the old lady remained in possession.

After many vicissitudes this bill came up for a hearing before Judge Windes on March 24, 1916, four years after the time it was filed. Mrs. C now 74 years old, could scarcely remember any of the facts surrounding the matter. She had only one witness and he knew very little about the transaction. The attorneys for the Legal Aid Society went to trial expecting to lose the case, feeling however that justice was with the old lady. To their great surprise they were able to prove their case entirely by the witnesses for the other side, and Judge Windes declared the property should be given to the old lady, subject to a lien for about \$1,000 to reimburse James C and Mr. M his father-in-law for the taxes and assessments, interest on the mortgage, and the \$700 of James' money still in the property, subtracting the \$1,000 he borrowed from the \$1,700 of his Hero Fund, which he used in clearing up the first mortgage.

Mrs. C was so surprised at the unexpected decision of the court that she scarcely knew what to make of it. She had believed that the Legal Aid Attorney who tried the case, Miss Eileen H. Markley, stood no chance against the three attorneys, all of them reputable members of the bar, who represented the defendant, and whose confident manner, loud voices and frequent thumps on the desks had reduced her to the verge of tears. As a matter of fact she wept quietly the whole morning while the case was on trial. When it finally dawned on her that the decision had been favorable, a great joy spread over her face, and she said, "Now I can live peaceably there for the rest of my days."

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#### THE ROMANCE OF PATRICK O'T.

Patrick O'T's case was referred to the Legal Aid Society by a certain judge of the Municipal Court.

Patrick, a cross-eyed, red-headed young peddler, had been a lifelong friend of one Martin H who when his mother died em-

ployed Patrick to work for him. Mr. H promised, if Patrick would work five weeks, to give him a horse and wagon, a new suit of clothes, and his (Mr. H's) sister-in-law in marriage. Patrick, being already deeply smitten with the lady, joyfully agreed.

Like Jacob of old, Patrick O'T toiled to win his bride. At the end of five weeks he received the suit of clothes and the horse and wagon, but no bride. He found that the horse was worth only \$2.50 for which sum he disposed of the animal to the "killers," buying another one for which he paid \$22.50, Mr. H contributing \$10.00 of this. The wagon was also found to be in poor condition, and Pat exchanged it for another one for which he had to pay \$7.00 cash.

The cruelest blow, however, came when his trusted friend Martin informed our client that he could not marry the lady of his heart as she was going to marry another man who could make more money. Mr. H further announced that Patrick must give back the horse and wagon. This Pat refused to do, claiming that it belonged to him, and that he had put it in a livery stable for safe keeping. Martin H then started a replevin suit, and the case came up before the Municipal Court judge before referred to. He, seeing that O'T had no one to defend him, continued the case and sent the young man to us.

We took up the case and told the client to bring in his witnesses. One morning he appeared with another man who, our attorney at first thought, was one of the witnesses. Such, however was not the case. On being asked the man's name our client showed some embarrassment and at last blushing announced that this was Martin H.

"What," gasped the attorney, "have you two men settled your quarrel already?"

"Yes," Pat replied, "It's all O. K. now."

It seems that the lady in the case had a will of her own. Finding out the way matters stood she had boldly declared that she was going to marry Patrick O'T; and she didn't care what anybody else said about it. "What could be better?" she had told her brother-in-law; "the horse and wagon would thus be kept in the family." He agreed, and peace was restored. The case was settled out of court, the judge awarding the plaintiff one cent damages and possession of the horse and wagon.

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Adda Eldredge,	

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## NOTE ON THE HISTORY OF LEGAL AID WORK<sup>1</sup>

By JOHN H. WIGMORE.<sup>2</sup>

TO THE EDITOR OF THE MASSACHUSETTS LAW QUARTERLY.

SIR: In your May number (pp. 172-184) you reprint a large part of the 15th Annual Report of the Boston Legal Aid Society, by Reginald Heber Smith, and you thus give it a permanent record in the archives of our profession. Permit me therefore to place on record in the same archives the correction of two errors of fact, on important points, occurring in that report.

Let me say first that the report is a masterly document, having a most unusual breadth of view as well as insight. These errors of fact were due to certain misleading statements appearing in the sources from which the able compiler drew his facts.

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<sup>1</sup>Reprinted from the Massachusetts Law Quarterly, I, 288 (1916).

<sup>2</sup>Professor of Law in Northwestern University School of Law.

1. On p. 179 it is stated that the Legal Aid Society of New York was founded as a German Society in 1876, and opened as a general one in 1896, and that "*until 1900 the history of legal aid work is the story of the development of the New York Society.*" and that in 1900 the Boston Society became the second one. This is an error of history. Already in 1888 *two societies* had been incorporated in Chicago,—one, the Bureau of Justice; the other, the Protective Agency for Women and Children. Both of these were purely legal aid societies, as now understood; neither one was limited to any nationality; the former took care of men's cases chiefly; the latter, of women's and children's cases; each was in charge of one or more regular attorneys, and each was supported by general contributions. Both of them, therefore, antedated the New York Society as general societies, though the New York one was the earliest in type.

In 1905, seventeen years after their founding, they consolidated into one, which was incorporated as the Legal Aid Society of Chicago. This date is what has misled the author of the Boston report. The date 1905 appears on the current reports of the Chicago Society as the year of its incorporation; but up to about 1912 its reports bore also the dates of incorporation of the two original societies.

History therefore should record, in favor of the Chicago Bar, that it was at least the second in this country to provide this kind of public service; and that it was the first to give unlimited scope to its work. As I myself was a subscriber, and familiar with its work as early as 1895, and possess a fairly complete set of the Bureau of Justice Reports, I feel a personal interest in seeing that the error of history contained in the Boston report of 1915 is not perpetuated in any other archives.

2. On page 183 the Boston report continues: "*Europe has learned the value of legal aid work from America, largely through the splendid work of Arthur von Briesen, president of the New York Society. . . . Germany, with characteristic thoroughness, has organized 300 municipal legal aid bureaus. . . . In 1913 a convention was held in Nuremberg, which was attended by delegates from Austria, Belgium, Denmark, Holland, Germany, Switzerland, and the United States.*"

This is the second error. The work of Arthur von Briesen has indeed been splendid, and Germany may have learned of legal aid work through him. But *the rest of Europe did not learn it from Germany*. There lies before me the Annual Report for 1898-

99 of the Law Students' Association for Legal Aid to the Poor, in Copenhagen; it was given to me on my visit to the headquarters of the society there, in 1905. It shows an annual income of 6,200 kroner; a staff of 34 councillors, 19 co-adjutors, and 25 assistants (5 women); and a total of 17,500 persons helped, 22,000 applications, and 40 different classes of legal advice given. The report does not give the precise date of the society's founding, but does make plain that it was prior to 1888; and the enormous number of applications received in 1898 (greater than the number for the New York Society at a much later period) shows that it must have been in existence a long time.

There lies before me also a copy of the "Regulations of the Lawyers' Association for Gratuitous Defense of the Poor in Criminal Cases," printed at Rome, and dated 1904; it was given to me by an officer of the society on a visit to that city in 1905. The date of the society's founding is not stated, but nothing appears to show that it is a new institution.

The truth is that legal aid society work, in one form or another, is no new thing anywhere except under the Anglo-American system of justice. In Scotland, for example, it has long been known; I have somewhere a citation to the history of legal aid work in Scotland, but I cannot now find it; perhaps it was in the "Juridical Review;" Professor Keedy's report also speaks of the fact (see the "Journal of Criminal Law and Criminology," III, 738). And I feel certain that an examination of the facts in continental countries would disclose a long history. Nor do I refer now to the Courts of Conciliation which, in Italy and Norway and elsewhere, have answered a similar purpose for civil claims; these represent a distinct mode of doing justice for the poor, and perhaps have rendered unofficial legal aid needless except in criminal cases.

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SOME OF THE INTERESTING PROBLEMS ENCOUNTERED IN PRACTICE AS ATTORNEY FOR  
THE LEGAL AID SOCIETY OF  
CHICAGO IN 1915-1916.

BY EILEEN MARKLEY ZNANIECKI<sup>1</sup>

The Legal Aid Society aims at securing justice for people in Chicago too poor to pay for the services of an attorney. As the greater number of poor people are immigrants or the direct descend-

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<sup>1</sup>Former attorney for the Legal Aid Society of Chicago.

ants of immigrants, it is not surprising that most of those who appeal to the Society for help talk in a foreign tongue and are unable to understand our language. Yet we expect them to understand and conform to our customs and to know our laws. "Ignorance of the law excuses no one." The acquisition of a new language is, however, a simple matter in comparison with the long process necessary under the present conditions of society before the average foreigner becomes "Americanized." For, these immigrants come to this country with certain traditional attitudes toward members of their family, neighbors, business associates, tradesmen, the upper classes and the government. These attitudes are not our attitudes. We sometimes find it difficult to believe that their attitudes really exist, so incomprehensible to us they frequently are. When our clients tell us of business dealings characterized by a lack of the fundamental precautions commonly found in business transactions in America, we often feel their cases nearly hopeless from a practical point of view; and it is only their honest faces and their earnestness that tempt us to try the cases out in court. In such cases there is seldom any difficult question of law involved. The decision of the court depends entirely on the judge's knowledge of human nature, and, more particularly, on his knowledge of the traditional attitudes and customs of the class to which the parties and witnesses belong. This knowledge is usually based upon common-sense observations, which are always unscientific, often inaccurate, and sometimes false.

Last spring two cases were tried in behalf of Legal Aid clients in the Municipal Court of Chicago, the results of which depended absolutely on the judge's knowledge of the traditional attitudes of foreigners. In the case of *K— v. T—*, our client, a poor Polish woman, claimed to have loaned \$300 to a neighbor without taking any note or any receipt, and without a definite understanding as to when and how the money was to be returned, with no agreement for interest, and, of course, with no security. Her cross-examination was so full of contradictions about the way she got the money and where she had kept it before lending it to the defendant that it left one in doubt as to whether she ever had any money to lend. On the other hand, the defendant introduced some testimony that was so clearly perjured that it gave the impression of a deliberate plan to lie. In the other case, hereinafter called the *Krokom* case, a laborer recently arrived from Russian Poland, claimed to have left several hundred dollars, tied up in different rolls, each roll belonging to a member of his family, in

a safe-deposit vault belonging to a firm of two Jews, about whose honesty he knew nothing whatever. When he later visited the vault he found that all his money had disappeared.

These cases were tried by judges equally experienced, both Irish and both past middle age. Judge R. decided in favor of the plaintiff in *K— v. T—*, and stated that the lower class of Polish peasants from which both the plaintiff and the defendant came were accustomed to consider borrowings and lendings among friends as family affairs without formalities of any kind, and that, while the defendant's testimony bore the stamp of untruth, the plaintiff's testimony was convincing on the whole, though unreliable in part, precisely in those parts where he would expect to find it so; for his experience had shown him that Polish immigrants are so suspicious of American conditions of life that they guard and hoard their savings in queer ways and that they will not divulge these fully even when they are under oath on the witness-stand.

This case was called to the attention of Professor W. I. Thomas and Dr. Znaniecki, who are making a study of the Polish peasant which will shortly appear in print. Commenting on it in their preface the authors say:

"The Polish peasants lie in court because they bring into the court a fighting attitude. Once the suit is started, it becomes a fight where considerations of honesty or altruism are of no account any longer and the only problem is not to be beaten. Here, we have indeed a formula that may become, if sufficiently verified, a sociological law; the lawsuit, and a radical fighting attitude, result in false testimony. Apparent exceptions will be explained then by influences changing either the situation of the lawsuit or the attitude. Thus, in the actual case the essence of most of the testimony for the plaintiff was true, namely, the claim was real. But the claim preceded the lawsuit. The peasant woman would not have started the suit without a just claim; for, as long as the suit was not started, considerations of communal solidarity were accepted as binding, and a false claim would have been considered the worst possible offense. . . . There was no cause making a false claim possible, for the law subjectively for the peasant can be here only a means to redress, not a means to inflict wrong; since he does not master it sufficiently to use it the wrong way, and the desire of redress is the only attitude that is not offset by the feeling of communal solidarity."

This case has been appealed and it will be interesting to compare the reasoning of the Appellate Court with that of the Municipal Court in its explanation of the various inconsistencies appearing

in the testimony of all the parties concerned. The evidence leaves us entirely at sea, unless we do make some generalizations, more or less scientific, concerning the customs of the Polish peasants. If the plaintiff's claim was honest, why did she not rest on her honesty and tell a straight-forward, clear and convincing story of how she came by her money and what she did with it up to the time of her loan? If the defendant really did not get the money, why did she not give a consistent account of the occurrences alleged as the reason for the loan and why did she introduce, to corroborate her story, witnesses who obviously knew nothing of the matter?

In the *Krokum* case, Judge M. after hearing the preliminary statement of the case and before hearing the evidence, expressed his disbelief in the plaintiff's story that he kept money lying in a safe-deposit vault when he could have put it out at interest, and he stated that we could not prove our case. The decision against our client was clearly based upon the judge's lack of familiarity with the habits of such men as our client. He remarked that the plaintiff should have known better than to leave his money in a safe-deposit vault, if he did.

These are only two typical cases. Every law case in America where immigrants are involved probably presents to the attorney and the judge complications resulting from attitudes of the foreigners which are different from our attitudes. Most of the difficulties experienced by immigrants in this country come from slight or serious misadaptations to their new environment. They understand only those situations and attitudes which they were accustomed to meet in their native countries, and failing to meet them here, they fall into hopeless confusion; and it is only after long and painful experience that they learn how to adapt themselves to the demands of American life. The lawyer or judge who imagines that certain action could not have occurred because it does not seem to him reasonable or probable that it should occur under the given circumstances, is bound to fall into error.

Experience with divorce cases in the superior and circuit courts has shown that the judges are kind-hearted and humane men and that they dislike holding a marriage void, especially where there are children, on grounds that appear technical or arbitrary. But this tendency has received a severe check in the last year. The uniform marriage act enacted by the legislature in 1915, provides conclusively that all marriages of Illinois residents celebrated outside of the state which would be void if celebrated within the



state are equally void though celebrated in a state according to the laws of which the marriage would ordinarily be valid. This has made it practically useless to contest bills of divorce in which the charge is remarriage within a year from the divorce of either party, especially since it is impossible to get temporary alimony while the case is pending.

The law making void all marriages celebrated within a year after the divorce of either party has been used as an instrument for injustice in all of the cases invoking it which came under our observation. In nearly all of them the woman was ignorant of the law, sometimes she was ignorant of the prior divorce, and the man always made use of the law to escape obligations he had voluntarily assumed, when these obligations, for some reason or other, became irksome to him. By allowing a man to take advantage of his own wrong in this way the law declares a relation entered into on both sides in good faith to have been illegal, bastardizes the children, if any, and throws upon the state, charity, or relatives the burden of their support. Surely the evil the statute was intended to prevent is slight compared to the harm caused to innocent people, and, eventually, to the state itself.

The other check to the humanitarian tendencies of the judges to uphold marriages was given by the recent decision of the Appellate Court in the *Matthes case*,<sup>2</sup> where the court, holding this particular marriage good for want of proof that the complainant was under the age of consent, declared all marriages by girls under 16 and boys under 18 absolutely void. Though this is *obiter dictum* in this case, it will probably be accepted as authoritative in the absence of any further interpretation of the statute. Apparently the children of such marriage are illegitimate unless the marriage is confirmed.

Perhaps the most unsatisfactory feature of the work as attorney for the Legal Aid Society is the inability to collect judgments because the client cannot furnish a real estate bond which is required before a levy on personalty will be made. The bonding companies will not go bond in such cases, even for a fee of \$5 or \$10, (which the case sometimes would justify). They say they are paid for the accommodation and not for the risk, and they do not take risks; they want to be able to fall back on the principal in case any loss is incurred; and as our clients are not "responsible" people, they might be unable to secure reimbursement, and, there-

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<sup>2</sup>*Matthes v. Matthes*, Appellate Court, First District, Gen. No. 21265; decision April, 1916.

fore, they will not go bond for them. The only possible way to surmount this difficulty would be for some charitable person to donate to the Society the title to real estate for this purpose. There would be risk, of course, that a levy might be made on property not belonging to the defendant; but since most of the judgments are small, and as the majority of these mistakes do not lead to difficulties, it might be well worth while to try such a plan.

We have had better success with our other problem, that of filing appearances for poor people in divorce cases. Appearances ordinarily cost \$3. The statute, providing that poor persons can sue without paying court costs, does not provide for their filing appearances as poor persons. Yet, it is more vital that a person be given a chance to defend his rights in court than that he be allowed to sue; because if he does not take advantage of his chance to appear when it is given him, his rights are cut off once for all; whereas a person can sue at any time within the period allowed by the statute of limitations. Most of the women who come to the Legal Aid Society to be represented in divorce proceedings have been abandoned by their husbands; they usually have two, three, or four little children and no means of support, or very little. It is often absolutely impossible for them to get \$3. After considerable effort in my term as attorney for the Legal Aid Society, I convinced the clerks of the Superior and Circuit Courts that poor women should be allowed to file appearances without cost, and the appearance fee was always scrupulously paid later, if any money was forthcoming from the husband. My strongest argument always proved to be: "But, I have done it before." It would seem that some decisive understanding with the judges should be reached, or the law amended, so that there will be no doubt in the future that women will not lose their day in court for lack of an appearance fee. If the Legal Aid Society did nothing more than protect the rights of these women and children whose husbands have deserted them, planning to avoid supporting them in the future, it would more than justify its existence. I found that in about half the cases, when the men found that the Society was looking after the interests of their wives and families they dropped their divorce cases, or failed to come to trial, and sometimes even became reconciled.

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## A JUDGE REVERSES HIS DECISION<sup>1</sup>

For a judge to reopen a case, reverse his decision, and order a return of the fine is so unusual an occurrence that the Legal Aid Society was at first assured it could not be done. This was recently accomplished, however, for one of our clients.

In December, 1915, Mary F. a clean, plain-looking Hungarian woman came to our office with her employer, Mrs. L., who explained Mary's case to the interviewer, as Mary was unable to speak much English. She said that Mary had worked for her by the day as laundress, for over a year, and that she had always found her to be good and honest. Recently Mary had been arrested and fined \$11. What the charge was against her Mary was unable to explain; Mrs. L. thought there must be some mistake about it, and wanted the Legal Aid Society to investigate the case.

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1. File No. 879. 11.

Mary explained (with Mrs. L.'s help) that on the evening of Dec. 13th she started to do some night scrubbing, but could not have gone far when she had a "spell," for she remembered nothing that happened to her from the time she left her room until she found herself locked up in a police station. She had another "spell" after reaching the station and so was given a bed for the night rather than a cell. The sum of \$15 was found by the matron in Mary's stocking, which represented the total sum of her savings, as she had spent most of her earnings to pay doctors' bills; \$11.50 of this \$15 was taken from her next morning as a fine by the court, and she was released—though she had not understood, she said, what the charge was against her.

We called up Mary's doctor, who said that he had treated Mary for some time for epilepsy, that there must be some mistake about her arrest, and that he would be willing to testify for her. The interviewer also called up another of Mary's employers, for whom she had worked for a long time. This lady spoke very highly of her, and said she would be glad to help her in this matter if she could.

The interviewer then went with Mary to the court where she had been tried and was surprised to find that the charge against her was that of soliciting men. The policeman who had arrested her chanced to be in court, and said that Mary had accosted him and also two other men, who had testified against her. She cannot speak an English sentence correctly; so, after the woman's epileptic condition was explained to the policeman, he admitted that the meaning of her remarks to him might have been construed in different ways; that it was possible that he might have been mistaken; and that she might have been asking for help. She does not remember what occurs when she has an epileptic attack; and she said that she did not remember to have seen this policeman. Had she known that the charge against her was soliciting men, she would not have told her employer of her disgrace. She is alone in Chicago; her husband deserted her because of her epilepsy, and she has no children. She had not had much work recently, and was nearly penniless.

These facts were all explained to Judge F., and a reopening of the case and the return of Mary's money asked for. The Judge said the fine could not be returned. This was reported to the superintendent, who conferred with Judge Olson on this point. Judge Olson very kindly conferred with Judge F., and the result was that the Legal Aid representative was asked to return to Judge F.'s

court before the thirty days had elapsed since Mary's trial—the time limit in which a case may be reopened. Mrs. L., Mary's employer, who had first brought her to the Legal Aid Society, went with the Legal Aid representative to the court on Jan. 13th. Judge F. reopened the case, reversed his decision, discharged Mary, and ordered that her fine of \$11 be returned to her.

The clerk of the court, however, maintained that in spite of all this the fine could not be returned. A claim for the \$11 was taken to Alderman Rodriguez, who signed it, and presented it to the City Council; and on July 1, 1916, Mary received an order for \$11 on the city treasury and got her money. More important, however, than the return of her money was the reversal of the charge on the police record involving her character. Mary wished to express her gratitude by presenting to the Legal Aid worker who handled the case a piece of fine embroidery she had made; and she seemed disappointed that her gift could not be accepted.

### THE TROUBLES OF AN ALIEN IMMIGRANT\*

The night was growing colder, and Jacob W. quickened his steps; the chill was beginning to strike through his thin coat. The place could not be very much further off, and Jacob was certain that he would find work there—fourteen miles to the south, they had told him, and he must have walked three-quarters of that distance. He was approaching a low range of hills; beyond them he was certain he would see the light of the farmhouse where he felt sure that food and work awaited him. He commenced to ascend the first of the hills. He reached the top, clambered over a fence and started to descend. There was no fort there, no uniformed soldier or border guard—nothing at all to convey to the mind of Jacob that he had stepped from under the shadow of the palladium of the empire of the old world and in under that of the empire of the new. There was nothing at the top of the hill save a blasted tree and the fence. Jacob plodded on crunching the snow under his clumsy boots. As he mounted the last of the range of hills, he saw in the distance the gleam of the lights in the farmhouse. With new vigor he set out more rapidly toward his goal. Little did Jacob think that on that February night he had violated the letter of a section of the august federal statutes, and that he had entered the United States at a point other than a point designated as a port of entry by the Department of Labor. For he had started

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2. File No. 1113. 11.

in Canada, and he was now in the United States. And he was unlawfully there.

Jacob did not find work at the farmhouse. Still seeking work, he drifted further into the interior, and finally reached St. Paul. He was told there that in Chicago he would do better. So he finally reached the polyglot city of the West. Here he found a fellow-countryman of his—a man from the same district, who gave him work. Jacob found that he could save money. He began to plan to bring his wife, Annie, who was still in Canada, across the border. He inquired how much a ticket would cost, and when he had the proper amount gathered together, he sent it to her with directions how to get to Chicago. But in procuring the ticket he then found that he was an object of interest to the federal government; it wanted to know if he was really married, why he had left his wife, and how he came in. When he had answered the questions and disclosed his mode of entry, and these facts were reported to Washington, a warrant was promptly issued for his arrest. The inspector of immigration in charge at the Chicago office telephoned the Legal Aid Society of Chicago to send one of their attorneys to represent the alien at the preliminary hearing. The attorney, believing that it was a deserving case, and that the alien was one of the higher type of immigrants, signified at the hearing his intention to submit a brief on the case to the commissioner general of immigration and through him to the secretary of the Department of Labor.

It seemed a hopeless task at the time. The brief as submitted set forth the purpose of the immigration laws as gathered from the utterances of the Supreme Court of the United States and the inferior federal courts. It was pointed out that the purpose of the laws was to prevent the entrance into the United States of those who were mentally or physically unfit to assist in the upbuilding of the nation and who were liable to become public charges; and that the law in question, ordering the deportation of aliens entering at another point than a designated port of entry, was merely a part of the general scheme; and it was shown by the evidence submitted that Jacob W. did not belong in such a class. The brief was sent to Washington. During these negotiations Jacob W. remained a federal prisoner in the county jail.

Finally, on September 6th, a letter was received by the Legal Aid Society from the Chicago office of the immigration service, announcing that the secretary of the Department of Labor had canceled the warrant against the alien, and that he was set at liberty. In all, the time that elapsed from the time of his arrest until his release was thirty days.

# ILLINOIS APPELLATE COURT CASES MONTHLY DIGEST

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## IN THE FIRST DISTRICT.

(Opinions digested by Student Editors Caldwell, Boyd, Coon, Fairweather, Postelnek, Carson, Price, Segal and Turnbull.)

OPINION FILED FEBRUARY 16, 1916.

### Contracts—Suretyship and Guaranty.

1a. *Snitzler Adv. Co. v. Orr*, Gen. No. 20483. *Held*: (1) Where one agrees to be primarily responsible for certain money due and in a notation says, "This applies to" another note, he will be primarily liable on the latter note, and it is not a mere contingent guaranty. (2) The contract of guaranty should be construed as favorably to the creditor as other written contracts, and not most strongly in favor of the guarantor. *Affirmed*. (GOODWIN, J.)

OPINION FILED FEBRUARY 19, 1916.

### Evidence—Prima Facie Proof—Duty of Explanation on Defendant When He Has Peculiar Knowledge of Facts—Control of Streets.

2a. *Bolger v. City of Chicago*, Gen. No. 20854. *Held*: (1) Where one has charge or management of a thing in connection with which an accident happens which in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of proper care; in case of such an accident the duty of explanation is thrown upon those having charge of the thing, particularly when information concerning the thing itself is within the particular or peculiar knowledge of the defendant. (2) The entire and complete control of the surface of the street and everything underneath it is vested in the city. *Affirmed*. (GOODWIN, J.)

OPINIONS FILED FEBRUARY 24, 1916.

### Parent and Child—Mother's Right to Custody.

3a. *People, ex rel Parker v. Bryson*, Gen. No. 21232. *Held*: (1) The law jealously upholds and protects the mother's superior right to the custody of her own child unless it has been forfeited by absolute relinquishment or some course of conduct or conditions that render its assertion incompatible with the parental claim and the child's best interests. (2) Compared with the mother's natural rights, the strain upon the feelings of the foster mother in parting with the child, hard as it may be, can not be considered. *Reversed*. (BARNES, J.)

### Appeal and Error—Sufficiency of Brief—Sufficiency of Abstract.

4a. *A. J. Bates Co. v. Di Nunsio*, Gen. No. 21233. *Held*: (1) Where a plaintiff in error's brief contains no reference to any place in the abstract where the court may discover any ruling claimed to be erroneous, the court cannot be expected to search through the abstract to find the rulings complained of. (2) An abstract that requires the court to go through the record to ascertain what were the actual rulings of the court and what were the controlling features of the evidence and what were the instructions to the jury does not meet the purposes for which one is required. *Affirmed*. (BARNES, J.)

### Admissions of Counsel—Evidence—Books of Account.

5a. *Ehelich v. Lakeside Fish & Oyster Co.*, Gen. No. 21239. *Held*: (1) Any fact bearing upon the issue involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. (2) The books of account of a purchaser are not admissible as against the seller. *Affirmed*.

### Carriers—Liability for Interstate Shipment—Evidence—Telephone Conversation.

6a. *Cohn v. Atchison, Topeka & Santa Fe Ry. Co.*, Gen. No. 21248. *Held*: (1) In interstate shipments, when the carrier's tariffs and schedules are duly



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established under the Federal Act Regulating Commerce, and the goods are received for transportation under the terms and conditions of a uniform bill of lading, prepared in the form approved and recommended by the Interstate Commerce Commission, the carrier's liability for any loss or damage shall be regulated by the terms and conditions of the bill of lading. (2) A telephone conversation with an unidentified person in a defendant's office is admissible in evidence. Reversed. (BARNES, J.)

OPINIONS FILED MARCH 7, 1916.

### **Affirmed on the Facts.**

7a. *Miller Brewing Co. v. Heilman Brewing Co.*, Gen. No. 21835. Affirmed on a review of the record. (McSURELY, P. J.)

### **Reversed on the Facts.**

8a. *Becker v. Hollensen*, Gen. No. 21875. Judgment reversed and judgment of *nil capiat* entered, on a review of the record. (McSURELY, P. J.)

### **Negligence—What is Contributory Negligence.**

9a. *McCausland v. Chicago City Ry. Co.*, Gen. No. 21890. *Held*: (1) To stand so close to a moving car as to be struck by it is negligence. (2) Even tho defendant was negligent the law prohibits a recovery where the plaintiff was guilty of contributory negligence. Reversed with findings of fact. (HOLDOM, J.)

### **Contracts—Modification of Instrument Under Seal.**

10a. *Warner v. Pacific Coast Casualty Co.*, Gen. No. 21914. *Held*: A parol agreement to modify an instrument under seal, when executed is valid. Reversed and judgment here. (McSURELY, P. J.)

### **Replevin—Suit on Bond—Res Adjudicata as to Ownership—Tender.**

11a. *Cermack v. Guggenheim Laundry Machine Co.*, Gen. No. 21923. *Held*: (1) As between parties the findings as to ownership in a replevin suit is *res adjudicata* and cannot be raised again on the trial of the suit on the bond. (2) When the property in goods in a replevin suit has been determined the goods should be returned in accordance with the judgment in that suit and the plaintiff need not sue out a writ of *retorno habendo* as a condition precedent to suit on the bond. (3) An offer to return the goods unaccompanied by a tender is not a performance of the condition of the replevin bond, a compliance with or satisfaction of the judgment in the replevin suit. Affirmed. (HOLDOM, J.)

### **Separate Maintenance; What Necessary For.**

12a. *Von Der Brelie v. Von Der Brelie*, Gen. No. 21949. *Held*: Where husband offers to provide a home and live with wife, and she refuses to do so, unless he disposes of his property as she wishes, she is not within statutory conditions entitling her to separate maintenance. (Hurd's Ill. Stat. Chap. 68). Affirmed. (McSURELY, P. J.)

### **Statutes; If of Other State, Error to Construe as Matter of Law.**

13a. *Treadwell v. Central Bank*, Gen. No. 21950. *Held*: In an action on certificates of deposit, it is error to construe statutes of another state, when pleaded, as a matter of law. Statutes are pleaded as matter of fact and statutes and decisions should be allowed in evidence. Reversed and remanded. (HOLDOM, J.)

### **Reversed on the Record.**

14a. *Gavin v. State Bank of Monticello*, Gen. No. 21951. Reversed on a review of the record. (HOLDOM, J.)

### **Negotiable Instrument—Statute of State of Execution a Good Defense.**

15a. *Albright v. Farmers and Traders Bank of LaFayette, Indiana*, Gen. No. 21952. *Held*: Where defendant pleaded the statutes of another state govern-

ing negotiable instruments and a meritorious defense under it, and these defenses were eliminated by the court on motion of the plaintiff, it is assignable error. Reversed and remanded. (HOLDOM, J.)

**Negligence—Violation of an Ordinance.**

16a. *Devine v. Chicago Railways Co.*, Gen. No. 21982. *Held*: The violation of an ordinance is not negligence *per se*, but is *prima facie* evidence from which the jury may infer negligence, but such inference may be rebutted by evidence. Revised and Remanded. (McSURELY, P. J.)

**Statute of Limitations in Equity.**

17a. *United States Fidelity & Guaranty Co. v. Dickason*, Gen. No. 21996. *Held*: Equity courts in cases of concurrent jurisdiction should consider themselves bound by the Statute of Limitations which govern courts of law in like cases, and this rather in obedience to the Statute of Limitations than by analogy. Reversed. (HOLDOM, J.)

**Estoppel.**

18a. *Speer Hardware Co. v. Consolidated Adj. Co.*, Gen. No. 21997. *Held*: A defendant having selected the accounts upon which he undertook to guarantee collection, cannot say plaintiff is in default as to the kind of accounts furnished. Affirmed. (McSURELY, P. J.)

**Guaranty.**

19a. *Galveston Shoe & Hat Co. v. Consolidated Adj. Co.*, Gen. No. 21999. *Held*: Where a party contracts to collect for three years and guarantees to collect a certain amount, he is allowed a reasonable time after the expiration of the contract to collect the amount guaranteed. Reversed and Remanded. (McSURELY, P. J.)

**Reversed on the Facts.**

20a. *Texas Co. v. Consolidated Adj. Co.*, Gen. No. 22000. Reversed on a review of the record. (McSURELY, P. J.)

**Appeal and Error; Error Must be Specifically Pointed Out.**

21a. *Narkiewics v. Wachowski*, Gen. No. 22008. *Held*: Court of review will never go to the record to search for evidence not specifically pointed out or argued, for the purpose of reversing the judgment of the trial court; and the general objections to the misconduct of the plaintiff's counsel, without specifically pointing out the misconduct complained of, will be cured by the ruling of the trial court. Affirmed. (HOLDOM, J.)

**Contracts—Indefinite Terms.**

22a. *Gray Lumber Co. v. Scharmer*, Gen. No. 22016. *Held*: The mere fact that certain terms of a contract may appear indefinite to a person not in that line of business does not render the contract indefinite as trade terms may be explained by testimony of witnesses in that line of business. Affirmed. (McSURELY, P. J.)

**Mandamus—Right of City Council to the Books of the School Board—Council Alone can Levy Taxes for Schools.**

23a. *People v. Board of Education*, Gen. No. 22226. *Held*: (1) The city council has the right to examine the books, records, documents and information concerning the receipt and expenditure of money by the school board, and the animus or motive of the council in seeking such examination will not affect its right; such right is based on the theory that through such knowledge of details the council will be able to intelligently exercise its powers, and is not required to rely on a communication from the school board as its sole and ultimate source of information. (2) Construing Chap. 122 Hurd's Rev. Stat. "An Act to Establish and Maintain a System of Free Schools" in force June 12, 1909, the board of education has routine powers of government of the schools, but to purchase property, lease property or borrow money it must have the concurrence of the council, and has no power to levy taxes, such power being left to the council and to do so intelligently the council has the inherent right

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to have access to the original sources of information. Reversed and Remanded. (McSURELY, P. J.)

OPINIONS FILED MARCH 9, 1916.

### Reversed on the Facts.

24a. *Puswaskis v. Seipp Brewing Co.*, Gen. No. 19492. Reversed and remanded on a review of the record. (BARNES, J.)

### Affirmed on the Facts.

25a. *Trybon v. Miller*, Gen. No. 20528. Affirmed on remittitur on a review of the record. (GRIDLEY, P. J.)

### Repair and Maintenance of Streets—Special Assessments.

26a. *Reinsi v. Commissioners of Lincoln Park*, Gen. No. 20574-20612. *Held*: (1) It is the original duty of a municipality to retain streets and after making the initial improvement they have no power to compel abutting owners by special assessment to pay for the maintenance or repairs. (2) An act authorizing special assessments is unconstitutional. Revised and remanded. (GRIDLEY, P. J.)

### Affirmed on the Facts.

27a. *Navigato v. Melone*, Gen. No. 20807. Affirmed on a review of the record. (BARNES, J.)

### Wills—Revoked Provisions of a Will—Executory Devise—Rules of Construction—Intention of Testator—Rule Against Perpetuities—Law Governing Construction When Testator Was Domiciled and Executed Will in Another State and There Dies.

28a. *Defrees v. Brydon*, Gen. No. 20938. *Held*: (1) The revoked provisions of a will may be regarded for the purpose of determining the intention of the testator. (2) An executory devise (or bequest), is such a disposition that thereby no estate vests at the death of the deviser, but only on some future contingency. (3) Courts will not construe the same words used in different parts of a will as having different meanings, if it is possible to avoid doing so. The intention to use the same words in different senses must be clear and beyond question. (4) Courts will give effect to the intention of the testator, unless it violates some established rule of law, and a will should be construed so as to avoid intestacy, if possible, as to any of his property. (5) The will and codicils must be read together as one instrument, and so far as practicable must be recognized or harmonized together as one consistent whole. (6) The rule against perpetuities is that "no future interests in property shall be created which must not necessarily vest within twenty-one years, exclusive of periods of gestation, after lives in being." (7) In ascertaining the intention of the testator, effect must be given to all the language used, if it can be done. (8) If one construction will render a portion of the language meaningless and another will give effect to all the words, the latter construction must be adopted. (9) Where the testator has been domiciled in another state where the will and codicils were drawn and executed, and dies there, their construction and effect as to the property involved (personality), must be governed by the law of that state. Reversed. (McGOORTY, J.)

### Reversed on the Facts.

29a. *Defrees v. Brydon*, Gen. No. 20939. Reversed on a review of the record. (McGOORTY, J.)

### Affirmed on the Facts.

30a. Gen. No. 21042. Affirmed on a review of the record. (GRIDLEY, P. J.)

### Judge and Jury.

31a. *Woodsmall Construction Co. v. Hall*, Gen. No. 21085. *Held*: Inconsistency of pleading is not a matter for the jury's consideration. Reversed. (BARNES, J.)

**Carriers—Limitation of Liability by Contract—Measure of Damages for Delay in Transit.**

32a. *Behrends v. Chicago, Rock Island & Pacific R. R. Co.*, Gen. No. 21090. *Held*: (1) To make the terms and conditions of a receipt limiting the carrier's liability effectual it must be delivered to the shipper at the time the goods are accepted for carriage, unless there is some agreement for its delivery at a future date. (2) Unless otherwise limited by the contract to carry, the measure of damages is the difference between the market value at the time and in the condition it should have arrived, and the cash market value in the condition and at the time it actually did arrive, plus the necessary expense to the shipper caused by the delay. Affirmed. (GRIDLEY, P. J.)

**Affirmed on the Facts.**

33a. *Rinaker v. American Bond and Mortgage Co.*, Gen. No. 21138. Affirmed on a review of the record. (BARNES, J.)

**Evidence—Weight of Evidence.**

34a. *Bush v. Farrington Automobile Co.*, Gen. No. 21150. *Held*: (1) It is not the law that if the number of witnesses on each side is equal, the evidence is therefore evenly balanced and that he who has the affirmative of the issue must fail. (2) The mere fact that more witnesses testified on one side than on the other does not, of itself, determine the weight of the evidence. Affirmed. (GRIDLEY, P. J.)

**Pleading—Motion to Dismiss—Landlord and Tenant—Parol Agreement Altering Terms of a Written Lease—Directed Verdict—Effect of Waiver of Notice and Demand in a Lease—Want of Possession.**

35a. *Horvitz v. Shanfield*, Gen. No. 21174. *Held*: (1) Motion to dismiss a suit for forcible detainer because a prior suit of the same character was pending when latter suit was begun is properly denied. (2) So long as the contract contained in a lease under seal remains executory, a plaintiff has the right to repudiate a parol agreement and claim the full amount of rent contracted for. (3) Where there is no evidence that would warrant a finding of the issue of fact for the defendant, a verdict is properly directed unless there was error at law. (4) Where the terms of the lease expressly waive notice and demand, a suit will be without any notice or demand to quit the premises. (5) Where the uncontradicted evidence is that the defendant refused to permit the removal of the plaintiff's goods from the premises, a defense of want of possession is without foundation. Affirmed. (BARNES, J.)

**Agency—Attorney's Implied Authority to Indorse Checks.**

36a. *North End Paper Co. v. State Bank of Chicago*, Gen. No. 21188. *Held*: In a case where an attorney at law is authorized to collect for a party who was at a place far distant the attorney has implied authority to endorse the name of the principal to the check received in the due course of his employment, however such indorsement does not make the principal liable as an indorser. Affirmed. (GRIDLEY, P. J.)

**Appeal and Error.**

37a. *Albrecht v. Pinger*, Gen. No. 21202. *Held*: Where the record contains no evidence nor a certificate of the trial judge as to what it tended to prove, nor anything by which a reviewing court could determine the applicability of the instructions complained of, it would not be justified in reviewing these instructions unless it was able to say that they were vicious under any and all circumstances. Affirmed. (BARNES, J.)

**Reversed on the Facts.**

38a. *Strassheim v. Reutlinger*, Gen. No. 21240. Reversed on a review of the record. (BARNES, J.)

**Evidence—Credibility of Conflicting Witness.**

39a. *Greiner v. Pennsylvania Co.*, Gen. No. 21278. *Held*: (1) Where distances are not actually measured but merely estimated, it is a well known fact that individual opinions greatly differ, depending on whether the judgment

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of the individual is good or bad, and without he is shown to be specially qualified from either nicety of judgment or special experience, there is no way in the absence of comparison with some physical object or known data by which the superiority of judgment of one witness of average intelligence over that of another can be determined. (2) An estimate of distance formed under circumstances with no fixed objects at definite distances with which to make comparison does not afford a sound basis upon which to base a verdict or finding when the burden of fixing the distance rests upon the person relying upon such estimate and when it is contradicted by equally credible evidence given by persons shown to be more familiar with the location and whose daily occupation requires them to exercise knowledge of distances. Reversed. (BARNES, J.)

**Appeal and Error—Appeal Bond—Authority to Enter an Order Nunc Pro Tunc—Extension of Time for Filing Appeal Bond—Compliance With Statute Granting Appeals.**

40a. *Newport v. McPherson*, Gen. No. 21296. *Held*: (1) Where no time is specified within which to file an appeal bond, it is assumed that the time given was twenty days, the shortest time allowed by statute. (2) The facts supporting the authority to enter an order *nunc pro tunc* must affirmatively appear of record. (3) After the time for filing an appeal bond has expired, the court has no jurisdiction thereafter to extend the time for filing the bond. (4) The statute granting the rights of appeal must be strictly complied with. Appeal Dismissed. (BARNES, J.)

### OPINIONS FILED MARCH 15, 1916.

**Bills and Notes—Holder in Due Course—Question of Fact for the Jury—Payment for a Preexisting Debt as Valuable Consideration—Duty of Counsel to Bring Attention of Court to an Alleged Erroneous Instruction.**

41a. *Gundlach Adv. Co. v. Hallam & Co., a corp.*, Gen. No. 20806. *Held*: (1) Whether or not one who brings an action on a negotiable note is a holder in due course or had derived his title from a holder in due course so as to come within the Negotiable Instruments Act, Sec. 59, Ch. 98, is an issue of fact under the evidence for the determination of the jury. (2) The indorsee of negotiable paper, before its maturity, taking it as payment or security for a preexisting debt, and without any express agreement, shall be deemed a holder for valuable consideration in the ordinary course of trade, and shall hold it free from latent defenses on the part of the maker. (3) If an oral charge to a jury by a court contains anything erroneous or objectionable, or omitted anything essential, it is the duty of the complaining counsel to bring the matter to the attention of the court. Affirmed. (PAM, P. J.)

**Negligence—Usual Construction of Elevators as Standard by Which to Determine Question of Negligence—Assumption of Risk.**

42a. *Kumrowski v. Armour & Co.*, Gen. No. 20911. *Held*: (1) The usual construction of elevators cannot be taken as the standard by which it is decided whether the construction in a particular case is negligent or not. (2) While ordinarily the question of whether a servant has assumed the danger which he has encountered is one of fact yet it will become one of law when but one conclusion can be drawn from the evidence by all reasonable minds. Affirmed. (GOODWIN, J.)

**Workmen's Compensation Act—Section 3 Construed—Extra Hazardous Businesses.**

43a. *Bishop, Admn'r. v. Bowman Dairy Co.*, Gen. No. 21016. *Held*: (1) Clause 8 of section 3, subsec. (b) of the Illinois Workmen's Compensation Act (Chap. 48, Hurd's R. S.), includes only those enterprises which were of such a character that the legislature or a municipality had felt called upon to make provisions for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employes or the public therein. (2) Sanitary municipal regulations do not bring within the scope of the provision of the Compensation Act above referred to, enterprises that would otherwise not be included. (3) The business of separating and bottling milk and cream, loading it on wagons and delivering it is not such a

business, occupation or enterprise as falls within the scope of either clause 3, 4 or 8 of Section 3, (b) of the Workmen's Compensation Act. Reversed and remanded. (GOODWIN, J.)

**Affirmed on the Facts.**

44a. *Wolf, Sayer and Heller v. Tessem*, Gen. No. 21041. Affirmed on a review of the record. (PAM, P. J.)

**Chattel Mortgage—Validity Thereof When Not Executed According to Provisions of Statute—Innkeeper's Act—Innkeeper Has Lien on Piano for Charges—Reversed on Point not Raised at Trial.**

45a. *The Baldwin Company v. Keeley*, Gen. No. 21139. *Held*: (1) A chattel mortgage, not executed, acknowledged and recorded as provided for by statute, even though valid as between mortgagor and mortgagee, is invalid as to those not parties or privies thereto. (2) A piano brought into a hotel by a guest must be considered as part and parcel of either his or her effects or valuables within the meaning of the Innkeeper's Act and the proprietor of the hotel, inn or boarding house is entitled to a lien upon same for charges. (3) Courts of review are opposed to reversing cases upon questions which should have been raised in the court below and which are raised for the first time on appeal or writ of error. Affirmed. (PAM, P. J.)

**"Pure Food Law" of Illinois—Construction of.**

46a. *People v. Fifty Cases, etc. of Shell Eggs—(Perfection Egg Co., Claimant)*, Gen. No. 21171. *Held*: An article of food that is not to be used by the producer, is held for sale within the meaning of Chap. 127 "B" of R. S. of Ill. which provides for the condemnation of "any articles of food," etc. "that is adulterated," etc., "and is being sold or offered for sale or exposed for sale within the State of Illinois," regardless of the state or condition or form the article may be in at the time it is ultimately sold. Affirmed. (GOODWIN, J.)

**Affirmed on the Facts.**

47a. *People v. Fourteen Cases, etc. of Shell Eggs—(Perfection Egg Co., Claimant)*, Gen. No. 21181. Affirmed on grounds set out in Gen. No. 21171. (GOODWIN, J.)

**Forcible Entry and Detainer—When the Action Will Lie—What Questions Can be Determined Under Action of Forcible Entry and Detainer—Estoppel.**

48a. *Lencki v. Schults*, Gen. No. 21212. *Held*: (1) An action for Forcible Entry and Detainer will lie if the plaintiff shows he has a deed from the grantor in possession and has made a demand for possession, followed by a refusal and a continuance in possession. (2) In action for Forcible Entry and Detainer the question of title between plaintiff and defendant or anyone else, cannot be tried, and the right to possession is not dependent upon his title but upon the existence of particular facts specified in Clause 6, Section 2, of Forcible Entry and Detainer Act. (3) Where a tenant in an action for possession by the landlord asserts an adverse right and denies the relationship of landlord and tenant, he is estopped from afterwards claiming that such relationship exists. Affirmed. (PAM, P. J.)

**Pleading—Variance—Negligence Inferred.**

49a. *Meske v. H. Piper Co.*, Gen. No. 21224. *Held*: (1) In a 4th class case in the Municipal court, it being unnecessary for plaintiff's claim to be set up with as much particularity as is required in a declaration, there is no variance where the averment in the statement of claim is that defendant's team and wagon were left "unattended, unhitched, and unguarded.....in Madison Street." and the evidence shows that the team was left unattended and unhitched in a yard adjoining Madison Street. (2) Negligence may be inferred from the fact of a runaway, taken in connection with the other circumstances attending the same, even in the absence of direct evidence thereof. Affirmed. (O'CONNOR, J.)

**Practice—Time for Raising Objection.**

50a. *B. & O. Chicago Terminal R. Co., v. Illinois Brick Co.*, Gen. No. 21282. *Held*: Where no objection is made to the allowance of interest in the

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trial court, a party cannot raise a question of this nature for the first time in a court of review. Affirmed. (O'CONNOR, J.)

### Appeal and Error—Finality of Master's Findings—Costs in Contempt Proceedings.

51a. *Reese v. Reese*, Gen. No. 21300. *Held*: (1) Unless the findings and conclusions of the master, concurred in and by the chancellor, are clearly and manifestly against the weight of the evidence, they must be affirmed. (2) There is no error in assessing the costs of a contempt proceeding against the defendant if found guilty, payment of which is a condition precedent to a discharge from any order of commitment entered because of the contempt. Affirmed. (PAM, P. J.)

### Contributory Negligence—When Not a Question of Fact for the Jury—Reversal of Judgment.

52a. *Louthan v. Chicago City Railway Company*, Gen. No. 21347. *Held*: (1) The question of contributory negligence is one of fact for the jury and only becomes one of law when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there be any difference of opinion on the question, so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. (2) A court of review will not reverse a judgment unless they can say the verdict is manifestly against the weight of evidence. Affirmed. (O'CONNOR, J.)

### Divorce Act—Solicitor's Fees.

53a. *People v. Mehan*, Gen. No. 21454. *Held*: (1) Although a wife cannot ordinarily obtain an allowance for solicitor's fees for past services, she may receive same where it is shown payment thereof is necessary in order to enable her to further carry on an action or maintain her defense thereto. (2) The allowance of solicitor's fees under our Divorce Act is not contingent upon a successful termination of the suit, but if it appears at the time of making the request that the wife has a probable cause of action, she is entitled to the benefit of Section 15, of our Divorce Act. (3) The mere fact that the court in consideration of the husband's circumstances makes the terms of payment of the solicitor's fees convenient for him is no reason why the husband should be relieved of paying them when the suit terminates unfavorable to the wife. (4) When the court orders payment of solicitor's fees *in futuro* and the bill is afterwards dismissed for want of equity, the court commits no error in expressly retaining jurisdiction for the purpose of enforcing its order. Affirmed. (PAM, P. J.)

### Affirmed on the Facts.

54a. Gen. No. 21559. Affirmed on a review of the record. (O'CONNOR, J.)

### Parent and Child—Right to Custody—Foreign Marriage.

55a. *People v. Siems*, Gen. No. 21677. *Held*: (1) The parent has the right to the custody of his child as against the world unless he has forfeited his right, or the welfare of the child demands he be deprived of it. (2) The legality of a marriage taking place in a foreign state, when questioned in Illinois is to be adjudged by the law of the foreign state, except where the marriage is in violation of some positive law of this state. Reversed. (O'CONNOR, J.)

OPINION FILED MARCH 21, 1916.

### Equity Pleading—Order of Severance.

56a. *Walker v. Walker et al*, Gen. No. 22138. *Held*: Where a party is joined as co-plaintiff in error in a writ of error, does not appear and join in the prosecution of it, but on the contrary wishes to be heard in opposition to the writ of error, the party suing out the writ of error is entitled to an order of severance in accordance with Rule 10 of this court, and the objecting party is to be joined as co-defendant in error. Motion that no order of severance be entered, denied. (PAM, J.)

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OPINIONS FILED MARCH 27, 1916.

**Reversed on the Facts.**

57a. *Kraus v. National Council, Knights and Ladies of Security*, Gen. No. 21420. Reversed with a finding of facts on a review of the record. (McSURELY, P. J.)

**Reversed on the Facts.**

58a. *Johnson v. Morgan, et al.*, Gen. No. 21531. Reversed on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

59a. *Dolan v. Loker*, Gen. No. 21588. Affirmed on a review of the record. (McSURELY, P. J.)

**Evidence—Action on Injunction Bond—Collateral Attack of Court Decree—*Res Adjudicata*.**

60a. *Coulon v. Conover*, Gen. No. 21641. *Held*: (1) In an action on an injunction bond conditioned to pay all costs and damages that shall be awarded against the complainant in a specified suit pending, in case said injunction was dissolved, all that is necessary to prove plaintiff's case is the introduction in evidence of the injunction bond and the decree of the court in which the injunction bond was given. (2) In the action on the injunction bond, the decree of the court, in evidence cannot be collaterally attacked, notwithstanding the fact that a writ of error has been sued out in an attempt to reverse the decree. Until reversed or modified, the decree is *res adjudicata* and binds the parties. Affirmed. (HOLDOM, J.)

**Reversed on the Facts.**

61a. *Trafton, Guardian v. National Council, Knights and Ladies of Security*, Gen. No. 21681. Reversed with a finding of facts on a review of the record. (McSURELY, P. J.)

**Measure of Damages for Failure to Complete Building in Time.**

62a. *Johnson v. Feyrirsens*, Gen. No. 21684. *Held*: Where a contractor fails to complete a building by the time agreed, the measure of damages to be recovered or recouped by the owner is the fair rental value of the premises during the period of delay, and not the fair rental value up to the time the premises are leased. Reversed and judgment here for \$717.58 for Plaintiff. (HOLDOM, J.)

**Affirmed on the Facts.**

63a. *Paisley, et al. v. Michels*, Gen. No. 21687. Affirmed on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

64a. *McKenna v. South Park Commissioners*, Gen. No. 21692. Affirmed on a review of the record. (HOLDOM, J.)

**Reversed for Error in Procedure.**

65a. *Hartman v. City of Chicago, et al.*, Gen. No. 21720. Order for a writ of mandamus reversed for error in procedure. (HOLDOM, J.)

**Affirmed on the Facts.**

66a. *Brachas v. Sabbath and Weisskopf Co.*, Gen. No. 21723. Affirmed on a review of the record. (McSURELY, P. J.)

**Mechanic's Lien Act—Waiver of Liens by Contractor Binds Sub-Contractors.**

67a. *I. Lurya Lumber Co. v. Goldberg*, Gen. No. 21726. *Held*: Where a general contractor enters into an agreement to erect a building and in his contract waives all liens and claims or right of lien under the Mechanic's Lien Act for labor and materials furnished, etc., such waiver is binding upon all persons furnishing labor or materials under any sub-contract with the general contractor. Reversed. (HOLDOM, J.)



# ILLINOIS APPELLATE COURT CASES

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## IN THE FIRST DISTRICT

(Opinions digested by Student Editors Caldwell, Boyd, Coon, Fairweather, Postelnek, Carson, Price, Segal and Turnbull.)

OPINIONS FILED MARCH 7, 1916.

### Replevin Bond—Writ of Retorno Habendo Not Necessary Before Bringing.

112a.\* *Cermak for use of McCarty v. Guggenheim Co. et al.*, Gen. No. 21923. *Held*: In an action on a replevin bond that as to the ownership of the goods in question, the replevin suit settled the question, and this question cannot again be raised on the trial of the suit upon the bond. It is the duty of defendant to return goods replevined in accordance with the judgment in that suit, and it is not incumbent upon plaintiff to sue out a writ of retorno habendo as a condition precedent to his right to bring action upon the replevin bond. *Affirmed.* (HOLDOM, J.)

### Principal and Agent—Principal Estopped by Acts of His Agent.

113a. *Speer Hardware Co. v. Consolidated Adjustment Co.*, Gen. No. 21997. *Held*: Where defendant's agent selected accounts whose collections were to be guaranteed, defendant could not plead that plaintiff was in default in furnishing wrong kind of accounts. *Affirmed.* (McSURELY, P. J.)

### Guaranty Contract—If Election Once Given, Will Stand.

114a. *Galveston Shoe Co. v. Consolidated Adjustment Co.*, Gen. No. 21999. *Held*: In an action on a guaranty contract, which by its terms states that guaranty shall not apply to "bankrupt claims," "outlawed claims" and lost "debtor claims," and defendant is reserved a certain time to investigate said claims, it must be held, as a matter of law, if after time has elapsed, in which defendant is given permission to investigate said claims, and remains silent, that it will be presumed such investigation was made, and defendant elected to so let them stand. *Reversed and remanded.* (McSURELY, P. J.)

OPINIONS FILED APRIL 10, 1916.

### Husband and Wife—Wife Can Sue Husband on Judgment Note Under Chap. 68, Sections 1 and 8, Hurd's Ill. Statutes.

115a. *Hendrickson v. Hendrickson*, Gen. No. 21455. *Held*: Where a judgment note was given for valuable consideration by a husband to his wife, that under Chapter 68, Sections 1 and 8, Hurd's Illinois Statutes, authorizing the husband or wife to sue the other on all contracts except for services rendered to the other, the wife could sue the husband. *Affirmed.* (McSURELY, P. J.)

### Practice—Reversal on Matters Not Contained in the Abstract.

116a. *Leroy v. Scott*, Gen. No. 21632. *Held*: The abstract of the record failing to show any error of procedure or in the pleading, the court of review will not look beyond it. *Affirmed.* (HOLDOM, J.)

### Life Insurance—Provision Limiting Total Recovery on Life of One on Different Policies, When Not Issued at the Instance of the Insured, Is Valid.

117a. *Kleinschrodt v. Hancock Mutual Life Insurance Co.*, Gen. No. 21700. *Held*: Where there is a specific provision in an insurance policy, that if the total amount of insurance on the life of the insured, issued upon

\*Due to an error in numbering, there are no numbers 69a to 111a inclusive.

the application of any other person than the insured, including this policy and all others, be over a stated amount, no amount should be payable under the policy, it will be enforced as a reasonable provision, and as the insured had been insured on two previous policies to the amount of \$520 (the stated maximum) nothing could be recovered on this policy. Judgment reversed and judgment here. (McSURELY, P. J.)

**Practice—Adverse Finding on Special Interrogatory Conclusive Unless Seasonable Objection Is Made.**

118a. *Osech v. International Harvester Co. of N. J.*, Gen. No. 21822. *Held*: Where a special interrogatory is given to the jury at the request of one of the parties to the suit, and the finding on such interrogatory is adverse to the party requesting it, such finding shall be conclusive unless motion to set it aside is made thereupon. Affirmed. (McSURELY, P. J.)

**Assessment of Damages by Jury—When Necessary—Statement of Claim as Basis of Damages—Harmless Error—Effect of Striking Out of Affidavit of Defense—Purpose and Effect of a Motion to Strike Affidavit of Defense—Contracts—Rule of Construction—Distinction Between a Contract of Sale and a Contract of Bailment.**

119a. *Bradford & Co. v. U. S. Tent & Awning Co.*, Gen. No. 21964. *Held*: (1) Assessment of damages by a jury is unnecessary unless requested.

(2) Sworn statement of claim is sufficient from which to assess damages.

(3) Reading by a defendant of its affidavit of defense to the jury, while irregular, is harmless error.

(4) When a defendant's affidavit of defense is stricken the cause should proceed as in case of default.

(5) As applied to practice in the Municipal Court, the motion to strike the affidavit of defense is tantamount to a demurrer to defendant's pleading, which being sustained so far puts the defendant out of court that he can only cross-examine witnesses for the purpose of minimizing damages.

(6) In construing a contract, all its parts must be considered.

(7) When the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment and the title to the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed—it is a sale. Affirmed. (HOLDOM, J.)

**Contracts—Effect of Basing Refusal to Perform on Inability—When a Tender Is Unnecessary—Earnest Money—Definition Thereof.**

120a. *Lang v. Hedenberg*, Gen. No. 22012. *Held*: (1) By basing his refusal to perform a contract on his inability to do so, the defendant waives all other grounds of objection.

(2) Where a defective title is tendered and the conveyance is refused on the ground that the purchaser did not have the money, the purchaser cannot object to the title on the trial.

(3) The law does not require a needless formality, and an actual tender is unnecessary where the seller is ready, able and willing to perform on his part, and a tender would be a mere useless form.

(4) If before or at the time of performance the purchaser has declared his intention not to perform, or refuse to do so, the seller need only prove he was ready and willing to perform on his part.

(5) Earnest money in the hands of a trustee belonging to the seller, because of the default of the purchaser, cannot be returned to the purchaser, but may be decreed to be paid by the trustee to the seller.

(6) Earnest money is a guarantee that the contract will be performed. If the sale goes on it applies as part payment of the purchase money, but

## APPELLATE COURT DIGEST

if there is a default on the part of the purchaser, he has no right to recover the deposit, but it belongs to the seller. Affirmed. (BAKER, J.)

OPINIONS FILED APRIL 12, 1916.

### Pleading Declaration—Practice—Assessment of Damages After Default.

121a. Gen. No. 19494. *Held*: (In an action for damages sustained as a result of having been bitten by a dog owned by a defendant, it is not necessary that a plaintiff set out in his declaration that he was in the exercise of due care for his own safety.

(2) Where a default is taken against a defendant on account of his failure to plead, notice to the defendant is not necessary before the court can hold an inquest for assessing damages. Affirmed. (PAM, P. J.)

### Reversed on the Facts.

122a. *Pennoyer Company v. Wendnagel*, Gen. No. 20298. Reversed on a review of the record. (O'CONNOR, J.)

### Garnishment—Bulk Sales Law.

123a. *Cohn et al. v. Malo et al.*, Gen. No. 20409. *Held*: Goods and chattels obtained by a sale from a debtor, contrary to the provisions of the Bulk Sales Law, and consequently void as to creditors of the vendor, may be reached by such creditors in garnishment proceedings. Reversed and remanded. (GOODWIN, J.)

### Practice—Petition for Change of Venue.

124a. *Sherwood v. Smolt*, Gen. No. 20423. *Held*: A verified petition for a change of venue is in the nature of an affidavit and cannot be considered by this court, unless incorporated in the certificate of evidence signed by the trial court. Affirmed. (PAM, P. J.)

### Appeal—Discretion of Trial Court.

125a. *Thompson Co. v. Burns*, Gen. No. 20763. *Held*: A motion to set aside a default is addressed to the sound legal discretion of the court, and on an appeal the court will not interfere unless it appears that the discretion has been wrongfully and oppressively exercised. Affirmed. (GOODWIN, J.)

### Picketing—Rule in Cases of So-called "Peaceful Picketing."

126a. *Philip Henrici Co. v. Alexander*, Gen. No. 20934. *Held*: The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. Such picketing is unlawful and subject to the injunction remedy. Modified and affirmed. (O'CONNOR, J.)

### Affirmed on the Facts.

127a. *Muller & Muller v. Bernstein & Wolf*, Gen. No. 20936. Affirmed on review of record. (GOODWIN, J.)

### Reversed on the Facts.

128a. *Walsh v. New England Casualty Co.*, Gen. No. 21035. Reversed on a review of the record. (PAM, P. J.)

### Affirmed on the Facts.

129a. *Anderson v. Reiter*, Gen. No. 21049. Affirmed on a review of the record. (O'CONNOR, J.)

**Liability of Joint Tortfeasors.**

130a. *Bartholomae & Roesing Brewing Co. v. Chicago Ry. Co.*, Gen. No. 21058. *Held*: Where a judgment is given against one of several joint tortfeasors the court will not permit a reversal simply on the ground that the defendant thinks the judgment should have been given against all. Affirmed. (PAM, P. J.)

**Bailees—Liability for Loss—Burden of Proof.**

131a. *Glende v. Spraner*, Gen. No. 21061. *Held*: A bailee for hire is liable for loss only upon failure to use ordinary care, and it devolves upon the bailee to show that he exercised the degree of care required by the nature of the bailment, but where the goods bailed have been lost, stolen or destroyed by fire, the law will not presume negligence and the burden of proving the same passes to the bailer. Affirmed. (O'CONNOR, J.)

**Deposit of Money—Statute of Limitations.**

132a. *Kurowski v. Schnider*, Gen. No. 2114. *Held*: Where one deposits money with another with the understanding that the person receiving the same shall use it for his own benefit, and return it on demand, there is no duty or obligation resting upon the person receiving the money to return it until a demand is made, and consequently the statute of limitations does not begin to return until the return of the money has been demanded. Affirmed. (GOODWIN, J.)

**Appeal.**

133a. *Warder v. Lake*, Gen. No. 21116. *Held*: The finding of a trial court as to whether there has been an unconditional promise to pay a debt contracted before the defendant has been adjudicated a bankrupt will not be disturbed unless it is manifestly against the weight of evidence. Affirmed. (PAM, P. J.)

**Affirmed on the Facts.**

134a. *Devoe & Reynolds Co. v. O'Malley*, Gen. No. 21191. Affirmed on a review of the record. (GOODWIN, J.)

**Evidence—Offer of Evidence.**

135a. *Spitzer v. Meyer*, Gen. No. 21237. *Held*: Where evidence is offered which is objected to and sustained, the offeror is entitled to make his offer fully for the purpose of saving his record. Reversed and remanded. (GOODWIN, J.)

**Illegal Marriages—Right of Persons Under Statutory Age to Void Validity of Ceremony Performed by Justice of the Peace Outside His Jurisdiction.**

136a. *Matthes v. Matthes*, Gen. No. 21265. *Held*: (1) When our Legislature designated who may contract marriage, it was their intention to raise the age of discretion or consent from 14 and 12 years, as established by the common law, to 18 and 16 years respectively; therefore if a marriage is performed between people under such age of consent it may be annulled by either party before arriving at the age of consent.

(2) A justice of the peace may legally officiate at a marriage ceremony outside his jurisdiction. Affirmed. (PAM, P. J.)

**Affirmed on the Facts.**

137a. *Osberg v. Osberg*, Gen. No. 21292. Affirmed on a review of the record. (GOODWIN, J.)

## APPELLATE COURT DIGEST

### Divorce—Temporary Alimony.

138a. *Hart v. Hart*, Gen. No. 21351. *Held*: (1) Temporary alimony during the pendency of a suit under the Divorce Act may be allowed even where there is no valid marriage, if there is prima facie evidence that the marriage was valid when the alimony was allowed.

(2) No one can invoke the aid of a court of equity without submitting himself to its jurisdiction. *Affirmed*. (GOODWIN, J.)

### Judgment by Confession—Setting Aside of.

139a. *Fiedler v. Fiedler*, Gen. No. 21400. *Held*: Where timely application is made to set aside a judgment entered by confession, it is the duty of the court to allow the defendant to plead if a meritorious defense is shown by proper affidavits. *Reversed and remanded*. (GOODWIN, J.)

### Criminal Procedure—Merger of Counts Reversible Error.

140a. *Judgment—When not in conformance with verdict*. Gen. No. 21674. *Held*: (1) Where one count in an indictment charges a conspiracy to obtain money by means of a confidence game, and the other count charges the obtaining of money by means of the confidence game the crimes charged are distinct and separate, and there is no merger of these counts. (2) Where under the facts and circumstances in evidence in the case the verdict of the jury could not have been otherwise, even had the question to which an objection had been erroneously sustained, been answered otherwise, such error must be considered harmless. (3) Where a jury finds a defendant guilty of conspiracy to obtain money by means of a confidence game, while the judgment entered thereon adjudged defendant guilty of the crime of obtaining money by means of the confidence game, such informality of judgment does not render the judgment void, if the verdict is in accordance with the count in the indictment and the punishment fixed by the jury was the one provided by statute for the crime on which defendant was found guilty. *Affirmed*. (PAM, P. J.)

### Practice—Time for Presenting Bill of Exceptions.

141a. *Woodbury v. Continental Casualty Co.*, Gen. No. 21801. *Held*: A stipulation signed by the opposing party's attorney, that "the time for filing bill of exceptions be extended, etc.," empowers the court to extend the time for presenting a bill of exceptions, even where it is entered into after the time has expired. *Motion denied*. (GOODWIN, J.)

### Reversed on the Facts.

142a. *People ex rel Zimmerman v. Rhoebe*, Gen. No. 21910. *Reversed* on a review of the record. (PAM, P. J.)

### Equity Pleading—Bill to Remove Clouds from Title—Allegation of Possession—Bill for Injunction—Verification of Amendments—Equity Jurisdiction—Bill for Accounting—Impounding of Rents With Court Clerk.

143a. Gen. No. 22132. *Held*: (1) Where the premises are improved, an allegation that the complainants are in possession is essential in a bill to remove clouds. (2) Where a number of amendments are in one document, a verification by oath, appearing at the foot of the document, refers sufficiently to all of the amendments, when it mentions "amendment" in the singular number. (3) Where a bill avers that the complainants are the owners in fee simple of certain property; that they are in possession and entitled to the rents derived from the same, and these allegations are admitted to be true, an order that the rents of the property in question be impounded with the clerk of the court until the final disposition of the cause

is not in effect, the same as the appointment of a receiver. Affirmed. (O'CONNOR, J.)

**Property—Consequential Damages for Public Improvements.**

144a. *Childs & Co. v. City of Chicago*, Gen. No. 22381. *Held*: Private property may be taken or damaged for a public use upon payment of a just compensation, but where no part of the land or property is physically taken for or in making the proposed public improvements, and the damages claimed to result are therefore consequential only, the ascertainment and payment of such damages is not a condition precedent to the exercise of the power of taking or damaging such property. Reversed and remanded with directions. (PAM, P. J.)

OPINION FILED APRIL 17, 1916.

**Ultra Vires Contracts—Quasi Contractual Obligation.**

145a. *Dorothy v. Commonwealth Commercial Trust Co.*, Gen. No. 20870. *Held*: Although a contract is illegal and ultra vires, it would be unjust to hold that one who has received money under it should not return it, and the law implies a contract to return what has been received. Reversed and remanded. (MCSURELY, P. J.)

OPINIONS FILED APRIL 28, 1916.

**Affirmed in Part and Reversed in Part on the Facts.**

146a. *Anderson & Lind Mfg. Co. v. Carpenters' District Council of Chicago*, Gen. No. 20809. Decree affirmed in part and reversed in part, on a review of the record. (McGOORTHY, J.)

**Reversed on the Facts.**

147a. *Bacon v. Reichelt*, Gen. No. 20865. Reversed and remanded on a review of the record. (McGOORTHY, J.)

**Affirmed on the Facts.**

148a. *Booth v. Bell, Magill, Bell & Tilden*, Gen. No. 20919. Affirmed on a review of the record. (McGOORTHY, J.)

**Affirmed on the Facts.**

149a. *Macoy v. Barton*, Gen. No. 20982. Affirmed on a review of the record. (McGOORTHY, J.)

**Life Insurance Contracts—Failure to Comply with Conditions as to Payment of Premiums—Forfeiture—Burden of Proof.**

150a. *Helm v. Illinois Commercial Men's Association*, Gen. No. 21038. *Held*: (1) Where a life insurance policy provides for a forfeiture for the non-payment of the annual premium on or before a specified time, such provision is for the benefit of the insurance company, and the company has the right to waive the forfeiture and dispense with a prompt payment of the premium at the time when it is due. *Unless the circumstances show a clear intention to declare a forfeiture, it will not be enforced.* (2) Where the practice of the company, and its course of dealing with the insured, and with others known to the insured, has been such as to induce a belief that so much of the contract as provides for a forfeiture will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief. (3) The burden is upon the company to prove that the assured was not a member of their association at the time of his decease. Reversed and remanded. (McGOORTHY, J.)



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### **Affirmed on the Facts.**

151a. *University Hospital v. De Voney*, Gen. No. 21175. Affirmed on a review of the record. (BARNES, J.)

### **Reversed on the Facts.**

152a. *People v. Thomas and Snowden*, Gen. No. 21285. Reversed on a review of the record. (GRIDLEY, P. J.)

### **Contract Broker's Commission.**

153a. *Merigold v. The Twentieth Century Theatre & Amusement Co.*, Gen. No. 21290. *Held*: When a broker is employed by an owner to find a purchaser for his property, and through the broker's efforts the owner has been brought into communication with the purchaser, the broker cannot be deprived of his commissions because the owner of the property took up and completed the negotiations himself or through another party. Affirmed. (GRIDLEY, P. J.)

### **Affirmed on the Facts.**

154a. *Wagner v. Evans*, Gen. No. 21311. Affirmed on a review of the record. (GRIDLEY, P. J.)

### **Private Carriers—Negligence—Liability to Persons Invited to Ride by Person Hiring Vehicle.**

155a. *Dunne v. Boland*, Gen. No. 21316. *Held*: (1) A private carrier is required to exercise the same measure of skill and care which is applied to a person engaged in any special pursuit in which he undertakes to perform services for others for compensation. Such a one undertakes to possess the skill adequate to the undertaking, and promises to exercise due diligence and care in its performance; but ordinary skill, diligence and prudence are all that the law exacts from him. (2) The fact that a liveryman did not know the names or number of persons for whom the carriage was hired, does not affect his liability. Affirmed. (BARNES, J.)

### **Evidence—Irrelevant and Prejudicial Testimony.**

156a. *Monblatt v. Young and First Trust & Savings Bank*, Gen. No. 21395. *Held*: Where the purpose to bring out irrelevant and prejudicial matter before the jury is evident and it is impossible to tell its effect upon the jury, the judgment will be reversed. Reversed and remanded. (BARNES, J.)

### **Evidence—Parol Not Admissible to Overcome Effect of Delivery of Written Renewal Receipt for Insurance Policy.**

157a. *Schmidt v. National Life Insurance Co. of the United States of America*, Gen. No. 21406. *Held*: Where a written renewal receipt for a policy has been issued and delivered to the assured, stating therein that it was for value received and that the policy was continued in force for the period covering the accident, parol testimony cannot be heard to contradict its effect nor to show that the delivery of the receipt was conditional on an oral promise to pay the renewal premiums. (BARNES, J.)

### **Affirmed on the Facts.**

158a. *Illinois Surety Co. v. Frank*, Gen. No. 21460. Affirmed on a review of the record. (BARNES, J.)

### **Reversed and Remanded on the Facts.**

159a. *Parisi v. Heegn*, Gen. No. 21500. Reversed and remanded on a review of the record. (BARNES, J.)

**Criminal Contempt—What Constitutes the Offense—How the Offender May Purge Himself Thereof.**

160a. *People v. Samuel*, Gen. No. 21503. *Held*: (1) Before a person can be found guilty of criminal contempt it must clearly appear that in committing the offense complained of he was actuated by some malevolent intention to assail the dignity of the court, or to wilfully and knowingly interfere with its procedure or due administration of justice. There must be a union or joint operation of act and criminal intention. (2) A person may purge himself of criminal contempt by showing that he acted innocently or through ignorance and without any intention to wrongfully mislead or deceive the court. (GRIDLEY, P. J.)

**Affirmed on the Facts.**

161a. *Larson v. City of Chicago*, Gen. No. 21565. Affirmed on a review of the record. (BARNES, J.)

**Reversed on the Facts.**

162a. *City of Chicago v. Baker*, Gen. No. 21568. Reversed and remanded on a review of the record. (BARNES, J.)

**Reversed on the Facts.**

163a. *City of Chicago v. Johnson*, Gen. No. 21569. Reversed and remanded on a review of the record. (BARNES, J.)

**Contempt of Court—Misrepresentation by Surety—Definite Charge—Remedy by Indictment for Perjury.**

164a. *People v. Friedlander*, Gen. No. 21703. *Held*: (1) In proceedings for contempt of court which are criminal in their nature it is necessary that a defendant be apprised with reasonable certainty, by affidavit or rule to show cause of the nature of the charge against him and of the facts upon which the alleged contempt is predicated, and it is also requisite that he shall have a reasonable opportunity to answer the charge by a written answer under oath. (2) A defendant may answer the charge orally, under oath, in open court, if he chooses. (3) If, by his sworn answer he specifically denies the facts upon which the charge is founded, or if he sets up other facts which, if true, are sufficient to acquit him of the charge, then he must be discharged, for the reason that his answer in such case presents an issue of fact which cannot be tried by the court in a proceeding of this character. If the answer proves false, the remedy is by indictment for perjury. Reversed. (GRIDLEY, P. J.)

**Equity—Vexatious Litigation—Suit in a Foreign Jurisdiction Enjoined.**

165a. *Illinois Life Insurance Co. v. Prentiss*, Gen. No. 22454. *Held*: When a plaintiff brings an action on a life insurance policy in the jurisdiction where the contract was entered into, where the insurance company has its principal office, where plaintiff resides, where the insured lived and died, where the estate is being administered, where most, if not all, documentary evidence pertaining to the contract and matters of defense, and the necessary witnesses may be found, he may be enjoined from starting another similar suit on the same policy in a foreign jurisdiction with the avowed object of availing himself of the procedure recognized by the constitution of such foreign state whereby three-fourths or more of the jurors concurring may render a verdict, on the ground that the institution of such foreign proceeding would be vexatious and harassing to the defendant therein. Affirmed. (BARNES, J.)

**Stockholders' Petition for Receiver—Failure to Give Notice to Defendant Corporation—When Court of Equity Will Appoint Receiver for Solvent Corporations.**

166a. *Moe v. Royal Life Insurance Co.*, Gen. No. 22471. *Held*: (1)

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Where the propriety of the action of the court in appointing a receiver has been considered by the court upon a motion to discharge the receiver, and the court has sustained the original order by refusing to discharge him, the want of notice of the appointment is thereby cured. (2) A corporation will be placed in the hands of a receiver for misconduct of its officers or directors only when necessary to preserve the property or rights of creditors or stockholders. The mere misconduct of officers of a corporation is not sufficient ground for the appointment of a receiver, as a court of equity may forbid the misconduct or remove the officer from his position. Reversed. (GRIDLEY, P. J.)

OPINIONS FILED MAY 1, 1916.

### **Circumstantial Evidence—Presumption of Fact—Proof.**

168a. *Solda v. Hanreddy*, Gen. No. 21533. *Held*: (1) Where circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed. A presumption cannot be based upon another presumption and made the basis of recovery. (2) A presumption of fact which the jury is warranted in drawing may arise only from facts actually proved by direct evidence. One presumption cannot be the basis for a second presumption; that is, a presumption of fact is not alone a legitimate foundation for a second presumption of fact. Affirmed. (BAKER, J.)

### **Bailment—Checking Parcels with Proprietors of Theatre.**

169a. *Burnstein v. Alcazar Amusement Co.*, Gen. No. 21589. *Held*: A theatre which checks the property of its patrons while they attend its performances, is the bailee of such property, and whether it does so for or without reward, is required to take reasonable care of it, and for failure to do so must respond in damages to the owner. (HOLDOM, J.)

### **Real Property—Forcible Detainer—Rights of True Owner Against One in Possession by Forcible Entry.**

170a. *Ovenu v. Ovenu*, Gen. No. 21618. *Held*: When entry is made into vacant or unoccupied tenements without right or title, such entry is forcible, and the true owner may regain possession by means of the statute, if he is in possession of the premises, either personally, or through his tenants and agents. Affirmed. (HOLDOM, J.)

### **Practice—Judgments of Foreign Jurisdictions.**

171a. *Russell v. Mahaffey Co.*, Gen. No. 21693. *Held*: Where the court of a sister state had jurisdiction of the person and of the subject matter eventuating in the judgment in suit, the courts of this state are bound by its judgment, and it is conclusive against all the parties to it. Affirmed. (HOLDOM, J.)

### **Contracts—Presumption as to Intention—Power of Court.**

173a. *Carter v. Crist*, Gen. No. 21750. *Held*: A court of law has no right to presume contracting parties intended to insert in a written contract a provision other or different from that which the plain language used would indicate, and then give a construction to the contract which would be legitimate only if the contract contained the supposed omitted provision. Affirmed. (BAKER, J.)

### **Affirmed on the Facts.**

175a. *Devine, Admr., v. Chicago & Erie R. R. Co.*, Gen. No. 21802. Affirmed on a review of the record. (BAKER, J.)

**Personal Property—Pledge of Articles by a Bailee.**

176a. *Abel et al. v. Pos*, Gen. No. 21878. *Held*: No sale or pledge by a bailee of articles, the title of which is in another person, can deprive that other person of his right to recover the same from the pledgee. Reversed and remanded. (HOLDOM, J.)

**Reversed on the Facts.**

178a. *Addins, Young & Allen Co. v. Rhinelander Paper Co.*, Gen. No. 21940. Reversed and judgment here on a review of the record. (McSURELY, P. J.)

**Reversed with Finding of Fact.**

180a. *Coleman v. Ashland Catering Co.*, Gen. No. 22019. Reversed with finding of fact on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

181a. *Scown v. County of Cook*, Gen. No. 22022. Affirmed on a review of the record. (McSURELY, P. J.)

**Insurance—Acts Constituting Waiver of Conditions.**

182a. *Zink v. National Council Knights and Ladies of Security*, Gen. No. 22031. *Held*: The provisions of the by-laws of mutual benefit societies may be waived by the society, the local lodge or council of such society is the agent of the supreme lodge and may waive such by-laws by accepting dues and assessments with full knowledge of all the facts constituting a violation of the rules of the order or by other acts and conduct of its officers and agents of such a character as to induce a belief on the part of the assured that the society does not intend to exercise its right of forfeiture, but on the contrary recognizes the insured as a member of the society in good standing. Reversed and remanded. (BAKER, J.)

**Affirmed on the Facts.**

184a. *Prest v. Carman Laundry Supply Co.*, Gen. No. 22040. Affirmed on a review of the record. (McSURELY, P. J.)

**Appeal and Error—Appeal Bond.**

185a. *Hubbell Fertiliser Co. v. Jacobellis*, Gen. No. 22060. *Held*: (1) An appeal from the trial court, to be effective, must be in accordance with the order allowing it; but it does not follow that an appeal bond filed not in accordance with the order allowing the appeal is not obligatory upon the parties executing it. (2) The dismissal of an appeal is equivalent to a legal and technical affirmance of a judgment of the court below, so as to entitle the party to claim a forfeiture of the bond and have his action therefor. Affirmed. (BAKER, J.)

**Board of Education of Chicago—Nature and Functions—Rights of Taxpayers—Class Discrimination.**

186a. *People ex rel Fursman v. City of Chicago*, Gen. No. 22236. *Held*: (1) The Board of Education of the city of Chicago is a public corporation, created by legislative authority for the purpose of maintaining public schools and school buildings within that subdivision of the state. For the purposes of that function it receives from the taxpayers and holds as a trustee the school fund, and is bound to administer it for the beneficiaries of the trust. The taxpayers are in equity the owners of the fund, and the Board can only hold and apply it to legitimate purposes of the trust. The law is established, beyond doubt or controversy, that a bill to enjoin public officers so situated from misappropriating the fund in their charge is a

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proper remedy for a taxpayer. (2) The Board has power to pass rules regulating its teaching force, and generally such matters are within its exclusive discretion; but the Board has no power to pass an unreasonable rule in violation of the statute or constitution. (3) The Board may stipulate for the amount of training, the degree of proficiency and the physical fitness of its teaching employees, but it cannot provide that its teaching shall be done only by certain persons or classes of persons, members or non-members of certain societies. Affirmed. (McSURELY, P. J.)

### Reversed on the Facts.

187a. *Ellguth v. Litsinger*, Gen. No. 22492. Reversed on a review of the record. (BAKER, J.)

### Affirmed on the Facts.

188a. *Alleanza Italiana v. Papa*, Gen. No. 22508. Affirmed on a review of the record. (HOLDOM, J.)

## IN THE SECOND DISTRICT

(Opinions Digested by Student Editor Paul E. Price.)

OPINIONS FILED FEBRUARY 8, 1916.

### Practice—Bill of Exceptions—Expert Witnesses—When Competent—Effect of Opinion of Mine Manager—Purpose of Instructions to the Jury.

1b. *Comoronski v. Spring Valley Coal Co.*, Gen. No. 6084. *Held*: (1) The contention that the evidence does not support the verdict cannot be considered as presented for consideration when the bill of exceptions does not contain any motion for a new trial, nor does it state what the ruling of the court was upon such motion. (2) When the conditions referred to are actual conditions, and are matters that can be ascertained by common observation, under these circumstances the opinion of so-called expert witnesses upon the question whether or not the conditions were safe conditions is not competent. (3) Whether or not the mine manager considers the condition in a mine dangerous, is not the true criterion upon which to base the right of recovery and the company cannot be relieved from liability by the opinion of the mine manager that it was not a dangerous condition, if the jury finds, as a matter of fact, from the evidence, that the condition was dangerous. (4) The purpose of instructions to the jury is to tell them what the law is, rather than what the law is not. Affirmed. (NIEHAUS, J.)

### Negligence—Degree of Care—Self-serving Declarations—Medical Opinion of Cause of Damage—When Admissible—Evidence of Impairment of Physical Condition—Proof of Loss of Time—Time for Making Objections Specific.

2b. *Shearer v. A. E. & C. R. R. Co.*, Gen. No. 6093. *Held*: (1) The operator of a street car is bound to exercise more care on approaching a street crossing than when running the car in the middle of a block, because he must anticipate the legitimate use of the crossing by vehicles and persons. (2) When an attending physician has been called in, not for the purpose of securing his testimony upon the trial of the case, but for the purpose only of procuring from him treatment for the physical injuries from which the plaintiff is suffering, and the doctor makes the diagnosis of the case, in order to give him proper treatment, and does afterwards treat him in conformity with the diagnosis made, under such circumstances, the testimony of a physician concerning the subjective symptoms manifested is competent. (3) Where there is no conflict in the evidence, as to the manner of receiving the

injury, or the means by which the injury was inflicted, it is competent for a physician to testify whether, in his opinion, the damage which he finds was caused by reason of the injury received. (4) The fact that a plaintiff cannot earn as much after the injuries, on account of his physical condition, is clearly evidence of the fact that his physical condition was impaired. (5) Where the declaration sets out the injury received and the evidence establishes the extent and character of the injury, while the evidence may not show the exact number of days lost by the plaintiff, yet it shows the fact that the plaintiff was disabled, and unable to pursue his usual business, and from these facts loss of time is so far established, that the jury may properly take that into consideration in estimating the damages sustained. (6) When the specific objection that there was no allegation in the declaration to cover loss of wages is made for the first time in the court of review, it is of no avail. Affirmed. (NIEHAUS, J.)

**Oral Instructions—When Competent—Assumption in an Instruction That a Verdict Will Be Returned for a Particular Sum or Party—When Error.**

3b. *Aurora Trust & Savings Bank v. Fidler*, Gen. No. 6100. *Held*: (1) It is not competent for a court to instruct a jury orally concerning the verdict they should render except in relation to matters that pertain strictly to the form of the verdict, or to a correction of the form of the verdict. (2) It is reversible error for the trial court to orally instruct a jury concerning the law of a case, or to orally qualify or explain written instructions which have been given. (3) To instruct a jury orally as to the method which they are to pursue in arriving at the amount of a verdict is error. (4) Where the evidence is conflicting, it is error for the court to assume, in an instruction, that a verdict will or should be returned for any particular party or any particular sum. Reversed. (NIEHAUS, J.)

**Sufficiency of a Petition for the Vacation of an Old Road—Roads and Bridges Act Construed.**

4b. *People ex rel v. Schwieson*, Gen. No. 6106. *Held*: (1) When a petition for the vacation of an old road and the laying out of a new road, it is not necessary to expressly state facts in the petition that those signing the petition were qualified to sign. All that is required is that the qualification shall appear in the recitals in the petition. (2) The Road and Bridges Act does not require that the vacating of an old road and the laying out of a new road, even where each is part of a general plan of improvement, to be carried out, must be included in one petition; while it would be perfectly proper to include both projects in one petition, it is not necessary to do so. Affirmed. (NIEHAUS, J.)

**Contracts—Time Is of the Essence.**

5b. *Gibson v. Pitney*, Gen. No. 6100. *Held*: At law, the time fixed for the performance of a contract is deemed the essence of the contract, and generally, if the seller is not ready and able to perform his part of the agreement, on the day, the purchaser may elect to consider the contract at an end. Affirmed. (NIEHAUS, J.)

**Negligence—Need Not Be Anticipated—Federal Act Relating to Liability of Carriers in Interstate Business to Their Employees Construed.**

6b. *Koepke v. C., R. I. & P. Ry. Co.*, Gen. No. 6128. *Held*: (1) The law does not impose a duty upon one to anticipate the negligence of others. It is a presumption of law that every person will properly perform the duty, which is enjoined upon him by law or imposed by contract. (2) The matter of contributory negligence, under the Federal Liability Act, does not bar the

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right of recovery, but simply affects the amount of damages which may be recovered; and the extent of contributory negligence and the proportionate reduction of damages are questions for the jury to determine. Affirmed. (NIEHAUS, J.)

**Practice—How Ruling of Court Striking a Pleading from the Files Can Be Saved for Review—Pleading Which Has Been Stricken from Files Not a Part of Common Law Record—Effect of Filing an Amended Special Plea—Extension Releasing Surety May Be Given in Evidence Under General Issue—Effect of Going to Trial Voluntarily Without the Formation of a Written Issue—Judgment at Law Must Be a Unit.**

7b. *Witteman Co. v. Golcke*, Gen. No. 6134. *Held*: (1) A ruling of court striking a pleading from the files cannot be reviewed in a court of appeal unless the pleading and the showing and the ruling are preserved in the bill of exceptions. (2) A pleading which has been stricken from the files is no longer a part of the common law record and can only be brought to the attention of the upper courts by a bill of exceptions. (3) By filing by leave of court an amended special plea, the defendant is deemed to have abandoned his original special plea and no question can arise upon the original special plea. (4) An extension releasing the surety may be given in evidence under the general issue. (5) When parties voluntarily go to trial without the formation of a written issue, the case is treated as if an oral issue had been joined. (6) Judgment at law must be a unit. Affirmed. (DIBELL, P. J.)

**Affirmed on the Facts.**

8b. *Palm v. Rockford City Traction Co.*, Gen. No. 6144. Affirmed on a review of the record. (DIBELL, P. J.)

**Practice—Default—When It Will Be Vacated.**

9b. *Swan v. Loofbourron*, Gen. No. 6147. *Held*: (1) As a general rule, a default will not be vacated merely to let in a set off, for the defendant has a perfect remedy by bringing suit against the plaintiff upon such set off. (2) A defendant cannot be heard in a court of review to urge a reason for vacating a default which he did not present to the court below. Affirmed. (DIBELL, P. J.)

**Reversed on the Facts.**

10b. *Siebert v. Public Service Co.*, Gen. No. 6148. Reversed on a review of the record. (CARNES, J.)

**Negligence—Degree of Care Required of City in Maintenance of Its Sidewalks—When Ordinary Care and Negligence Become Questions of Law.**

11b. *Hindle v. City of Joliet*, Gen. No. 6154. *Held*: (1) The city must use reasonable care to keep its walks in a reasonably safe condition, and nothing more is required of it. (2) Ordinary care and negligence are not questions of law unless the facts are so clear as to lead to but one reasonable conclusion. Affirmed. (CARNES, J.)

**Contracts—What Constitutes Waiver of Lien—Performance Necessary to Obtain Benefit of Advantageous Provisions of Contract—Effect of Modification of Contract—Interpretation—Lien Sometimes Remains Though Market Value Is Diminished by Work of Laborer—Pleading—Waiver of Variance.**

12b. *Chicago Great Western Railroad Co. v. American McKenna Process Co.*, Gen. No. 6161. *Held*: (1) A laborer waives his right of lien by

giving time beyond the date of delivery for payment. (2) A party in order to obtain the benefit of a provision of a contract advantageous to him, must conform to other provisions not in his favor. (3) A contract may be modified as to one of its provisions without affecting the liability of the parties under its other terms and conditions, unless such conditions are directly related to the modified condition, in which event the related conditions must be held also modified. (4) Where a contract is varied by subsequent agreement so as to require more time and greater expenditure on the part of a plaintiff to complete the performance of it, he is not obliged to sue on the original contract, but may recover on the common counts. But where the work is done under a special contract, the price must be governed by the stipulations of that contract, even where the plaintiff is justified in abandoning the contract and bringing his action for the *quantum meruit*. (5) In cases of doubt whether such changes and non-compliance exist as to permit a party to treat the contract or a provision in it, rescinded or abandoned, then, as in all cases of interpretation of doubtful contracts, the construction placed upon its provisions by the parties to the contract is of great aid and often controlling. (6) If an owner of property employs a mechanic to change its character to satisfy some special use or even whim of the owner, the mechanic is not deprived of his right of lien because the article may have less market value after it is finished than it had before. (7) A variance is waived if not suggested in the trial court. Affirmed. (CARNES, J.)

**Evidence—Valuation of Property—Conveyance to Relatives—Presumption of Fraud—Inadequacy of Consideration.**

13b. *American Steel & Copper Plate Co. v. Bilter*, Gen. No. 6162. *Held*: (1) Where property has a market value, evidence as to the assessed valuation is incompetent and immaterial in arriving at the value of the property. (2) A creditor in failing circumstances may deal with his relatives, and if there are no indications of fraud, no presumption arises from the relationship. If the transaction with a relative is one that might naturally be presumed if that relationship had not existed, then the fact of relationship does not matter. (3) Inadequacy of consideration is a fact calling for explanation, and therefore a badge of fraud, especially when such inadequacy is gross. Affirmed. (CARNES, J.)

**Bills and Notes—Payment for a Pre-existing Debt.**

14b. *Chemical Co. v. Teel*, Gen. No. 6165. *Held*: The making of a note of the debtor for a pre-existing debt is not payment, unless it is expressly agreed to take the note as payment, or unless the creditor parts with the note, or is guilty of laches in its presentation for payment. Affirmed. (DIBELL, J.)

**Negligence—Degree of Care Required of Village in Maintenance of Sidewalk—Instructions—When Sustained.**

15b. *Mills v. Village of Oquawka*, Gen. No. 6167. *Held*: (1) The duty of a village is to use reasonable care to keep its sidewalks in a reasonably safe condition for public travel thereon. (2) When one instruction given at the request of a defendant and another requested and refused, both containing the same statement of law as the instructions complained of, a defendant is not entitled to complain of that feature of the given instructions. Affirmed. (DIBELL, P. J.)

**Practice—What Constitutes a Final Judgment.**

16b. *Town of Magnolia v. Kays*, Gen. No. 6169. *Held*: (1) The form of a final judgment for defendant on verdict is that it is considered that the plaintiff take nothing by his suit and that the defendant go thereof without any further continuance or adjournment. (2) The question whether a judgment is final is not to be determined from the mere fact that costs and



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execution therefore are adjudged against one of the parties; costs are an incident to final judgment, but whether a judgment is final or interlocutory is to be determined from other considerations; it must, to be final, terminate and completely dispose of the action. (3) A judgment for costs may be entered when no final decision between the parties has been reached. Affirmed. (DIBELL, P. J.)

### Contracts—Measure of Damage for Breach—Recovery Under the Common Courts Practice—Effect of Affidavit of Defense.

17b. *Miller v. Thomas*, Gen. No. 6173. *Held*: (1) Where the vendor of land agrees to repurchase the land or secure a purchaser therefor within a certain time at a certain price and he fails to do so, the measure of damages if there has been a tender of deed by the vendee at the expiration of the specified time is not the difference between the contract price and the fair market value, but under such circumstances the entire contract price may be recovered. (2) Where a contract has been wholly executed and nothing remains to be done but to pay the amount specified, recovery may be had under the common counts. (3) A defendant is confined to the defenses which he sets up in his affidavit. Affirmed. (DIBELL, P. J.)

### Contracts—Effect of a Rescission—Effect of a Default—Practice—Form of a Judgment of Reversal.

18b. *Thompson Co. v. Decker*, Gen. No. 6179. *Held*: (1) The operation and effect of a rescission of a contract is to terminate all the rights of the parties under the original contract. The title to the goods is re-vested in the seller and he cannot maintain an action for the price. (2) Where work has been done or goods furnished under a special contract, the laborer or vendor may, because of the default of the other party, treat the contract as abandoned and bring an action for the *quantum meruit* of the work, and the price is governed by the stipulation in the abandoned contract. (3) In the absence of a waiver of the right of trial by jury, a court of appeal has no power to reverse a judgment and enter a judgment for the plaintiff's damages and costs in the court below. Reversed. (CARNES, J.)

### Affirmed on the Facts.

19b. *Jester v. Lee*, Gen. No. 6182. Affirmed on a review of the record. (CARNES, J.)

### Negligence—Degree of Care Required to Be Exercised by Children—Contributory Negligence—Practice—Cause for Reversal—Improper Instructions.

20b. *Johnson v. City of St. Charles*, Gen. No. 6186. *Held*: (1) A child is not required to exercise the same degree of care as an adult, but only such care as a child of his age, intelligence, experience and capacity would ordinarily exercise. (2) The question of contributory negligence is one of fact for the jury and not of law for the court unless all reasonable minds must agree as to the conclusion to be drawn from the admitted facts. (3) It is not for the court to direct the jury as to what facts do or do not constitute negligence. (4) Judgment should not be reversed unless the record shows a material error. (5) One who asks the court to give an improper instruction cannot be heard to complain of the court's action in modifying it, although the court fails to make it good. Affirmed. (CARNES, J.)

### Evidence—Hearsay.

21b. *Greenacre v. Aurora Brewing Co.*, Gen. No. 6187. *Held*: Declarations of an intention to commit suicide, not accompanied by some attempt at the time to carry them into execution are hearsay and not admissible unless there be privity of contract between the deceased and the plaintiff in the action. Affirmed. (CARNES, J.)

**Practice—Effect of Failure to Argue a Point Assigned for Error.**

22b. *Dowbia v. City of Ottawa*, Gen. No. 6189. *Held*: Where the refusal of an instruction is assigned for error and it is not argued, it is waived. Affirmed. (DIBELL, P. J.)

**Affirmed on the Facts.**

23b. *Mertel v. Walter*, Gen. No. 6191. Affirmed on a review of the record. (DIBELL, P. J.)

**Insurance—What Constitutes Contract—Evidence—Depositions—Time for Making Objections Thereto.**

24b. *Thompson v. Ancient Order of Gleaners*, Gen. No. 6193. *Held*: (1) The contract of insurance with a fraternal beneficiary society includes the constitution and by-laws of the society as well as the certificate. (2) It is not the proper practice to make objections to depositions on the trial of the cause. Affirmed. (CARNES, J.)

**Practice—Section Nine of Statute in Relation to Change of Venue Construed—Effect of Compliance with Requirements of Statute.**

25b. *Stauber v. Stauber*, Gen. No. 6194. *Held*: (1) A person who has been named as a defendant but who has never been served with summons nor entered on appearance is not a defendant whose consent to a change of venue is necessary under the statute. (2) When the requirements of the statute for a change of venue have been observed, the obligation of the court to allow it is imperative and admits of the exercise of no discretion. Reversed. (DIBELL, P. J.)

**Evidence—When Necessary to State Facts Proposed to Be Proved by an Answer—Exemplary Damages.**

26b. *Harris v. Schlink*, Gen. No. 6196. *Held*: (1) Where a question shows the purpose and materiality of the evidence it is not necessary to state what the answer would be. If the question is in proper form and clearly admits of an answer relative to the issue and favorable to the party on whose side the witness is called, the party is not bound to state the facts proposed to be proved by the answer unless the court requires him to do so. (2) While facts and circumstances tending to show a defendant acted in good faith, do not justify an assault or false imprisonment, and will not mitigate the actual damages, yet they are competent in mitigation of exemplary damages. Reversed. (CARNES, J.)

**Practice—Motion for New Trial Founded on Newly Discovered Testimony.**

27b. *Curran v. Junk*, Gen. No. 6199. *Held*: A motion for a new trial founded on newly discovered testimony should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied upon, or some excuse should be shown for not obtaining them. Affirmed. (CARNES, J.)

**Pleading—Exhibits Cannot Be Made a Part of Pleadings at Law—Practice—Judgment by Confession—Limitations Upon Power to Confess Judgment—Vacation of Judgments After Expiration of Term at Which They Were Rendered.**

28b. *Brown v. Atwood*, Gen. No. 6201. *Held*: (1) It is not permissible to make exhibits a part of the pleadings at law, though it is a common practice in equity. (2) Judgment by confession cannot be entered upon an award unless the arbitration has been conducted under the statute and in compliance with its terms. (3) There can be no valid warrant of attorney to confess judgment against the donor of the power where the amount of judgment is not fixed in the power. (4) There may be a valid warrant of at-

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torney to confess judgment for rent to become due by the terms of a lease where the monthly rental is fixed by the lease, and the amount due is ascertainable by inspection of the lease, but not for confession of judgment for other matters not ascertainable by an inspection of the lease. (5) Authority to confess a judgment without process must be clear and explicit and strictly pursued. A judgment so entered without such authority is a nullity. The judgment must be for a fixed and definite sum, and the facts supporting it must be established by the written documents required by the statute to be filed in order to authorize entry of judgment by confession. (6) There can be no valid power of attorney to confess a judgment on a common law award of arbitrators to be made after the attempted execution of the power. (7) A court has the power to vacate a judgment after the expiration of the term at which it was rendered if it was without jurisdiction to enter judgment. Affirmed. (CARNES, J.)

### Administration—Section Eighteen of Administration Act Construed.

29b. *Coffey v. Mann*, Gen. No. 6202. *Held*: In a case of a non-resident intestate, the public administrator is preferred to all except the widow, husband and next of kin resident in this state. Affirmed. (DIBELL, P. J.)

### Evidence—Character Testimony—What Constitutes a Pleading—Duty of Court in Regard to Erroneous Instructions Requested.

30b. *Weeks v. Jones*, Gen. No. 6204. *Held*: (1) The character of a party to a suit in assumpsit is not in issue. (2) The opening speech of counsel made on the trial is in no sense a pleading and cannot be considered as presenting an issue on which proof could be introduced. (3) It is not the duty of the court to amend or modify erroneous instructions, although he may do so if he sees fit. Reversed. (CARNES, J.)

### Municipalities—Right of a City to Charge for the Use of Parts of Its Streets Occupied by Poles—What Constitutes a Reasonable Charge.

31b. *City of Peoria v. Postal Telegraph Co.*, Gen. No. 6208. *Held*: (1) A city has a right to impose a reasonable charge in the nature of a rental for the exclusive use of the parts of the street occupied by telegraph poles. (2) A city has a right to impose a reasonable charge in the exercise of its police power in the nature of a license fee for the exclusive use of the parts of the street occupied by telegraph poles. (3) Rental or license fees for the exclusive use of the parts of the street occupied by telegraph poles are not an unlawful interference with interstate commerce nor a tax levied upon one of the instrumentalities employed by the United States government. (4) Ordinances charging for the use of parts of street occupied by poles are prima facie reasonable, and the burden of proof is upon those who assert the contrary. (5) Ordinances charging for the use of parts of street occupied by poles will not be declared void as unreasonable unless the unreasonableness is so clearly apparent as to demonstrate an abuse of discretion on the part of the city. Affirmed. (CARNES, J.)

### Affirmed on the Facts.

32b. *City of Peoria v. Western Union Telegraph Co.*, Gen. No. 6208. Affirmed on a review of the record. (CARNES, J.)

### Bills and Notes—Object of Common Counts.

33b. *Millet v. McDonald*, Gen. No. 6211. *Held*: (1) The object of the common counts in a suit upon promissory notes is to protect a plaintiff against some accidental variance in the description of notes sued on. Affirmed. (DIBELL, P. J.)

**Evidence—Proof of Loss of Support—Effect of Objections to Proof—  
Dram Shop Act—Effect of Conduct of Wife Sanctioning Use of  
Liquor by Husband.**

34b. *Erickson v. Svete*, Gen. No. 6215. *Held*: (1) The jury are authorized to infer loss to plaintiff's means of support from proof of the husband's death, alone. (2) Where a party prevents proof by his objection or procures its exclusion, he cannot object that such a fact was not proved. (3) Conduct of the wife, sanctioning the use of liquor by her husband, does not bar her from a suit against those who have sold him liquor and produced his habitual intoxication and death, and loss thereby to her means of support, but may be used in mitigation of damages. *Affirmed*. (DIBELL, P. J.)

**Affirmed on the Facts.**

35b. *Jewel Tea Co. v. Petersen*, Gen. No. 6220. *Affirmed* on a review of the record. (DIBELL, P. J.)

OPINIONS FILED APRIL 14, 1916.

**Ordinances—Rules of Construction.**

36b. *City of Spring Valley v. C. & P. Ry. Co.*, Gen. No. 6031. *Held*: (1) Ordinances should be so construed as to ascertain the legislative intent, and in construing ordinances they must be looked at as a whole. (2) Ordinances, no less than statutes, should be liberally construed, in order that their true intent and meaning may be carried out. *Reversed*. (NIEHAUS, J.)

**Affirmed by Operation of Law.**

37b. *Fleming v. E., J. & E. Ry. Co.*, Gen. No. 6042. *Affirmed* by operation of law. (*Per Curiam*.)

**Federal Employers' Liability Act—Effect of a Case Coming There-  
under—Elements Necessary to Come Within—What Constitutes  
Being Engaged in Interstate Commerce—Necessary Proof—Effect  
of Variance Between Pleading and Proof.**

38b. *Dunlavy v. C., B. & Q. Ry. Co.*, Gen. No. 6081. *Held*: (1) When a cause is comprehended within the meaning and scope of the Federal Employers' Liability Act, no action can be maintained under the state law. (2) To come within the federal statute the carrier must be engaged in interstate commerce, and the injured servant be then employed by it in such commerce. (3) A servant is engaged in interstate commerce while repairing a switch on tracks used indiscriminately for both kinds of commerce, and it is immaterial whether the train which struck him was engaged in that commerce or not. (4) A carpenter repairing a bridge over which both kinds of commerce are carried, if injured under such circumstances, cannot take his choice of remedy under the state and federal law, for he is engaged in interstate commerce and the National Act is exclusive. (5) All section men and track laborers working on any part of the track or switches used by a common carrier indiscriminately for both interstate and intrastate commerce are employed in interstate commerce within the meaning of the Federal Act. (6) A fireman on a locomotive engine repairing his engine for an interstate trip is, while so engaged, protected by the National Act, although the engine had not been coupled to the cars of the train. (7) Yard clerks in the employ of common carriers by railroad while inspecting and making a record of the seals on car doors, putting labels on cars to guide switching crews, etc., are employed in interstate commerce if the trains upon which they are working have any cars containing interstate commerce. (8) It is essential where the negligence complained of was that of a co-employee that he must also be employed in interstate commerce to come within the National Act. (9) A recovery cannot be had under a state law on pleadings

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counting only on that law when the evidence develops that the case is controlled by the Federal Statute, on the ground that the case pleaded was not proved and the case proved was not pleaded. Reversed. (CARNES, J.)

### Insurance—What Constitutes Contract in Fraternal Insurance Society.

39b. *Martin v. Fraternal Reserve Life Association*, Gen. No. 6094. *Held*: The application for membership in a fraternal insurance society must be considered a part of the contract of insurance; and where a member agrees in his application to abide by subsequently adopted by-laws, he is bound by them unless the by-laws are unreasonable. Reversed. (NIEHAUS, J.)

### Pleading—Effect of Failure to Join Issue on Special Pleas and Replications Filed—Effect of Failure to Deny a Material Matter Alleged in the Declaration—Landlord and Tenant—Tenant Estopped from Disputing Title of Landlord While in Possession—Eviction Defined.

40b. *Smith v. Bellrose*, Gen. No. 6123. *Held*: (1) Failure to join issue on special pleas and replications filed is not of importance where the parties voluntarily proceed to trial without formal written issues joined in that regard. (2) When a matter material to the issues is alleged in the declaration, and is not denied by a plea, such matter is admitted and it will be presumed to be a fact. (3) A tenant cannot dispute the title of his landlord, to the premises which he has obtained possession of, as tenant, while remains in possession thereof. (4) While it is not necessary that there should be an actual physical expulsion from the premises occupied by the tenant, to constitute an eviction, yet it is necessary that the landlord do some act which disturbs the tenant's possession, or which amounts to a clear indication of an intention on the part of the landlord to deprive the tenant of the enjoyment of the premises, as demised to him, to constitute an eviction. Reversed. (NIEHAUS, J.)

### Corporations—Right of a Stockholder to Examine Books.

41b. *Furst v. Rawleigh Medical Co.*, Gen. No. 6130. *Held*: A stockholder is not entitled to the right to re-open the question involved and settled by a former judgment by filing a new petition in which he seeks another judgment for an enlarged permission, for the examination of the books and records of his corporation. Reversed. (NIEHAUS, J.)

### Practice—Effect of Failure to File Cross Error—Evidence—Proof of Prior Contradictory Statement.

42b. *Pooler v. Southwick*, Gen. No. 6025. *Held*: (1) If one party appeals, the opposite party will be considered as acquiescing in all the rulings of the trial court, unless his objections thereto are presented by the filing of cross-error. (2) When a witness neither directly admits nor denies the acts or declaration about which he is asked, as when he merely says he does not recollect, or gives any other indirect answer not amounting to an admission, it is competent to the adversary to prove the affirmative, but without so proving the affirmative, he should not be permitted to assume that such contradictory statements had been made by the witness. Reversed. (CARNES, J.)

### Duties of Members of a City Council.

43b. *Dineen v. City of Ottawa*, Gen. No. 6108. *Held*: There is no foundation in law or reason for an assumption that a member of a city council must, at his peril, leave all the streets and walks of a city in a safe condition when he retires from office. Affirmed. (CARNES, J.)

**Pleading—Sufficiency of Declaration in an Action Under Federal Safety Appliance Act—Ambiguous Pleading—Evidence—Secondary Evidence Introduced Before Proof of Loss of Original—How Error Can Be Cured—Autoptic Proference.**

44b. *Wagner v. C., R. I. & P. Ry. Co.*, Gen. No. 6141. *Held*: (1) In an action under the Federal Safety Appliance Act the declaration must show facts from which it appears that the parties were engaged in interstate commerce. (2) Ambiguous pleading which would be bad on demurrer will be held good after verdict. (3) When secondary evidence is admitted when it should have been excluded when offered because of lack of proof of inability to produce the originals, the error is cured if it afterwards appears that the originals were lost. (4) In an action for damages for injuries, exhibition of the injured member is admissible. *Affirmed.* (CARNES, J.)

**Mortgages—Growing Crops—Title of Mortgagee—What Constitutes Severance.**

45b. *Hancock Mutual Life Insurance Co. v. Watson*, Gen. No. 6145. *Held*: (1) Crops growing upon mortgaged lands are covered by the mortgage whether planted before or after its execution, and until they are severed the mortgage attaches as well to the crops as to the land, and if the land be sold for condition broken, before severance, the purchaser is entitled to the growing crops, not only as against the mortgagor but as against all persons claiming in any manner through or under him subsequent to the recording of the mortgage. (2) A mortgage can take no better title than the mortgagor himself had. (3) While between the parties to a judgment, the seizure and sale of growing wheat upon execution issued upon the judgment will constitute a severance of the crop from the realty, yet as to a grantee in a deed of trust given by the execution debtor before the execution became a lien, such seizure and sale will not work a severance, and the purchaser at the sheriff's sale takes subject to the rights of the grantee under the trust deed, which will not be cut off or affected by such sale. *Affirmed.* (CARNES, J.)

**Contracts—Right of Vendee to Have Case Transferred to the Equity Side of Court When Sued for Purchase Money.**

46b. *Blemaster v. Rockey*, Gen. No. 6149. *Held*: A vendee sued at law for the purchase price of real estate cannot transfer the action to the equity side of the court by pleading an attempting to prove that the deed was given as a mortgage unless he succeeds in establishing the truth of his assertions. *Affirmed.* (CARNES, J.)

**Affirmed on the Facts.**

47b. *People ex rel v. School Directors*, Gen. No. 6150. *Affirmed* on a review of the record. (DIBELL, P. J.)

**Municipalities—Proper Method to Pass an Ordinance Over a Veto—Effect of Departure from Form**

48b. *Rogers v. City of Mendota*, Gen. No. 6151. *Held*: (1) By parliamentary rules the proper action to be taken by a legislative body when a measure adopted by it has been returned to it with a veto by the proper authority, is to move to reconsider the vote by which the measure was originally adopted. If a majority of the legislative body adopts the motion to reconsider, it is then proper to move the measure be adopted, notwithstanding the veto, or that it be passed over the veto. (2) A departure from the form prescribed for the passage of an ordinance will not affect the validity of such action unless the governing law makes such formality vital, as by declaring the ordinance void unless the formalities prescribed be followed. (3) To reconsider does not necessarily require a formal vote. *Affirmed.* (DIBELL, P. J.)

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### Highways—Entire Width Need Not Always Be Fitted for Travel— Nuisances—Effect of Custom or Usage—What Constitutes a Nuisance.

49b. *Wallin v. Mitchell*, Gen. No. 6152. *Held*: (1) While the whole way is primarily devoted to public use for travel and to that use all other rights may be subordinate, still whether it is or is not necessary to fit the entire width of the road for travel, must, in the great majority of cases, be a question for the decision of the local authorities. (2) Custom or usage may sometimes sanction an act which would otherwise be deemed a nuisance and relieve it from that construction. (3) Whether a farm wagon left within street limits is a nuisance and obstruction to public travel cannot ordinarily be determined as a matter of law, but should be left to the jury under appropriate instructions to find as a matter of fact. *Reversed*. (CARNES, J.)

### Instructions to Jury—When Erroneous.

50b. *Forbes v. Davis*, Gen. No. 6159. *Held*: An instruction which purports to state all the facts necessary to a recovery and ignores the matter of defense, of which there is proof, is erroneous. *Reversed*. (NIEHAUS, J.)

### Highways—Elements Necessary to Acquire by Prescription—Rights of a Licensee.

51b. *Heater v. Chicago & Alton Railroad Co.*, Gen. No. 6160. *Held*: (1) A prescriptive right cannot arise from a permissive use. (2) Mere travel by the public is not sufficient to establish a prescriptive right as a user. It must be under claim of right by the public and not by the mere acquiescence of the owner. (3) Mere acquiescence in use of a strip of land by public does not create a presumption of dedication to public travel. (4) To establish a public highway by prescription, the use by the public must have been adverse, under claim of right, continuous, uninterrupted and with the knowledge of the owner of the estate. Occasional travel is not sufficient. It must appear that a certain and well-defined line of travel has existed over the property for fifteen years. (5) A mere licensee has no greater rights than a trespasser. *Reversed*. (CARNES, J.)

### Contracts—Validity of a Partial Assignment—Effect of Section Eighteen of the Practice Act Upon the Rights of the Assignee.

52b. *Eaves v. C., B. & Q. Ry. Co.*, Gen. No. 6166. *Held*: (1) The assignment of a part of a claim or demand is not legally binding upon the payor, unless such assignment is accepted by him. (2) Under Section 18 of the Practice Act the assignee of a claim or demand may sue in his own name to recover the amount due; but the assignee's rights are otherwise no greater than, or more extended under this statute, than they were at common law. *Affirmed*. (NIEHAUS, J.)

### Contracts—Consideration Required by Surety—Practice—Rulings on Abstract Propositions of Law.

53b. *Commercial State Bank v. Folkerts*, Gen. No. 6170. *Held*: (1) It is not necessary that a surety should receive a separate and distinct consideration, for the obligation which he assumes by signing, merely because his signature is attached to the note on a different day from the date of signing by the maker, if the signing was originally intended and merely delayed. (2) The consideration received by the maker is sufficient to legally bind the surety to the obligation assumed by him in signing the note. (3) A conclusion of law based upon an assumed state of facts is a mere abstract proposition, and rulings on abstract propositions, even if correct, are harmless error. Incorrect rulings on abstract propositions of law are harmless error where the judgment is in accordance with the law and evidence governing the case. *Affirmed*. (NIEHAUS, J.)

**Principal and Agent—When Fraud Will Be Presumed.**

54b. *Maple v. Lawhun*, Gen. No. 6175. *Held*: (1) Where the confidential agent of the owner of property with access thereto and abundant opportunity to transfer it to his own possession without the knowledge of the owner turns up with the property in his possession after the death of the owner, he is required to assume the burden of establishing that he came by such property in good faith. *Affirmed.* (DIBELL, P. J.)

**Practice—When Certiorari Is Unnecessary—Effect of Certification of Record—Organization of Circuit Court—Scope of Master's Report—Mechanics' Lien—Property Over Which It Extends.**

55b. *Rubendal v. Tarbox*, Gen. No. 6176. *Held*: (1) When an amended record has been made and properly certified and is ready to be filed, the issuance of a certiorari is unnecessary. (2) A record duly certified by the clerk of the court below imports verity and cannot be contradicted by affidavit of counsel. (3) There are not two separate Circuit Courts, one at law and the other in chancery, and if the court is properly convened it is for the transaction of all kinds of business, unless the statute provides otherwise. (4) It is a recognized and valid practice, upon a reference to a master, for that officer to report all stipulations and agreements made orally by the parties appearing before him. (5) Where parties contract to erect a building upon lands severally owned by them, it is not error to place a lien on the entire tract for the entire amount due the contractors. *Affirmed.* (DIBELL, J.)

**Marriage and Divorce—Alimony—Amount—How Determined—Nature of Order.**

56b. *Kingman v. Kingman*, Gen. No. 6178. *Held*: (1) Allowance of alimony should be made with a view to the income of the husband, and when it will result in diminishing the estate from which the income is derived it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. (2) The order for alimony is under the constant control and supervision of the court and may be changed from time to time as conditions change. *Reversed.* (CARNES, J.)

**Equity Pleading—Who Should Be Made Parties—Effect of Lack of Parties.**

57b. *Marcy v. Marcy*, Gen. No. 6180. *Held*: (1) In equity every person having equitable or legal rights in the subject matter of the suit should be made a party. (2) It is not necessary that the lack of proper parties should be set up by either side, for whenever the court finds a lack of proper parties it will, ex-officio, take notice of such omission, and will refuse to proceed in the suit till the pleadings have been amended and the omitted parties brought into court. *Reversed.* (DIBELL, P. J.)

**Negligence—What Constitutes Evidence of Contributory Negligence—Time When Due Care Must Be Exercised.**

58b. *Johnson Oil Refining Co. v. Galesburg Ry., Light & Power Co.*, Gen. No. 6181. *Held*: (1) A violation of an ordinance is a circumstance properly to be considered by the jury in determining a question of contributory negligence. (2) Parties are charged with the exercise of due care, when driving vehicles over a crossing, as well as elsewhere. *Affirmed.* (NIEHAUS, J.)

**Recoupment Defined.**

59b. *Burns v. Clark*, Gen. No. 6184. *Held*: Recoupment is the act of abating a part on which one is sued, by means of a legal or equitable right resulting from a counter claim arising out of the same transaction. It is a



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reduction of the damages claimed by the plaintiff by proof of circumstances connected with the transaction on which the plaintiff's claim is based, which show that it would be contrary to good conscience to permit plaintiff to recover the full amount of his claim. This can be done under the general issue. Affirmed. (DIBELL, J.)

### **Contracts—Construction—Equity Pleading—Necessary Allegations in Bill—Alleging Fraud—Necessary Showing for Relief—Practice—Time for Filing Motion to Vacate—Facts Necessary to Give Jurisdiction.**

60b. *Friedberg v. De Pew*, Gen. No. 6190. *Held*: (1) Where two papers signed are a part of the same transaction, one signed by one party to the contract, and the other by the other party to the contract, both papers constitute one contract and are to be considered as one instrument. (2) While equity takes concurrent jurisdiction with law courts in matter of fraud, accident, or mistake, the facts constituting such fraud, accident or mistake as a defense to the enforcement of a judgment must be set out in the bill. (3) In order to entitle a defendant in a judgment to relief against such judgment on the ground of fraud, accident or mistake, it must be evident not only that he had a defense upon the merits, but that such defense has been lost to him without such loss being attributable to his own omission, negligence or default. (4) A motion to vacate a judgment filed at the next ensuing term after the confession of a judgment is in due time. (5) Where the purpose of the injunction prayed for is to stay proceedings at law, the statute requires that a bill having such purpose in view be brought in the county where the proceedings at law were had. Affirmed. (NIEHAUS, J.)

### **Negligence—What Constitutes Negligence.**

61b. *Donaghue v. Fraikin*, Gen. No. 6192. *Held*: Finding an animal on a public highway, unless the owner knowingly or negligently permits it to be at large, does not make a case of negligence. Affirmed. (CARNES, J.)

### **Evidence—Proof of Mental Capacity.**

62b. *Cellarins v. Junker*, Gen. No. 6197. *Held*: Where witnesses differ as to the mental capacity of a deceased and of his ability to legally transact business and to dispose of his property, the weight to be given to the testimony of witnesses is much more readily determined by a just chancellor than by a court of review which reads only the written evidence. Consequently when a case is heard by the chancellor, and the evidence is all or partly oral, it must appear that there is clear and palpable error before a reversal will be had. Where the issue is tried by the chancellor before a jury, and where the verdict of the jury is only advisory and may be set aside by the chancellor, the rule should be just as strong that clear and palpable error should appear before the decree should be reversed. Affirmed. (NIEHAUS, J.)

### **Contracts—Promise to Pay Debt of Another—When Within the Statute of Frauds—Liability of Husband for Necessaries—Liability of Third Party on a Contract Made for His Benefit.**

63b. *Laughlin v. Dalton*, Gen. No. 6200. *Held*: (1) A promise to pay the debt of another is within the statute of frauds unless it is founded on a new and independent consideration passing between the newly contracting parties and independent of the original contract. In the absence of such a consideration the promise is collateral. (2) A collateral promise, whether made before or after or contemporaneous with the promise of the primary or original debtor, is void unless in writing. (3) If a husband fails to supply his wife with necessities she may, while cohabitating with him, or upon his desertion of her, bind him by her contracts with third persons for such

purpose. (4) From the mere fact that a party desires to pay the debt of another and borrows the money from a third person for that purpose and pays the debt, an action at law cannot be maintained by the party loaning the money against the original debtor to recover the amount so loaned and used. It still remains the debt of the party borrowing the money and not of the party whose debt was paid. Affirmed. (CARNES, J.)

**Pleading—What Constitutes Waiver of Plea to Jurisdiction—Contracts—Rights of Nominal Plaintiff—Rights of Beneficial Plaintiff—Presumption as to Residence—Pleading—Effect of Going to Trial Without Formation of Written Issues—Necessary Allegations to Recover on a Policy of Insurance.**

64b. *Butler v. Natl. Live Stock Ins. Co.*, Gen. No. 6205. *Held*: (1) A plea to the jurisdiction is waived by a plea to the merits. (2) The nominal plaintiff cannot arrest or discontinue the suit except on a failure of the beneficial plaintiff to secure him against liability for costs. (3) The defendant may establish a set-off against the beneficial plaintiff. (4) If the beneficial plaintiff is a non-resident of the state he can be compelled to give security for costs. (5) The beneficial plaintiff may obtain a change of venue. (6) The beneficial plaintiff is the real party plaintiff to the suit. (7) The presumption against the pleader is that the beneficial plaintiff reside in the county in which suit is brought, and they, therefore, have the right to bring suit in that county. (8) Where parties voluntarily go to trial without the formation of written issues, the case is treated as if an oral issue had been joined. (9) Where a right is conferred by a clause in an insurance policy, which is absolute and unconditional in its terms, but the right is limited in a subsequent clause by a condition or exception, the pleader is not required to negative the condition or exception but it is for the defense to plead it. Affirmed. (DIBELL, P. J.)

**Carriers—Effect of Adoption of Carmack Amendment—Act of God.**

No. 65b. *Mueller Grain Co. v. Peoria & Pekin Union Ry. Co.*, Gen. No. 6209. *Held*: (1) Since the Carmack amendment to the Interstate Commerce Act, state legislation, regulations and policies are superseded and controlled by the Interstate Commerce Act. (2) When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God. Affirmed. (CARNES, J.)

**Negligence—What Constitutes Proof of Negligence—Evidence—General Reputation for Care—When Admissible—Elements Which May Be Considered by Jury in Determining the Question of Due Care.**

66b. *Follett v. Ill. Cent. R. R. Co.*, Gen. No. 6212. *Held*: (1) The absence of a headlight from a moving train in the night time tends to show negligence in the operation of the train. (2) General reputation that the deceased was a careful, industrious, sober man, possessed of all his faculties, is admissible as tending to show he was in the exercise of due care at the time of the accident, when there are no witnesses thereto. (3) In determining the question of due care, the jury have a right to consider the instinct common to man, prompting to the preservation of life and the avoidance of danger. Affirmed. (DIBELL, P. J.)

**Affirmed on the Facts.**

67b. *Rako v. Elgin, Joliet & Eastern Ry. Co.*, Gen. No. 6214. Affirmed on a review of the record. (NIEHAUS, J.)

**Evidence—Photographs—When Admissible—Practice—Motion for New Trial on Ground of Newly Discovered Evidence.**

68b. *Connors v. Winke*, Gen. No. 6219. *Held*: (1) Photographs, diagrams and drawings are often proper, not as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony. (2) In a motion for a new trial on the ground of newly discovered evidence, where no reason is given or suggested why the witnesses were not produced on trial, the court commits no error in disregarding the affidavits of their proposed testimony. Affirmed. (CARNES, J.)

**Workmen's Compensation Act—Effect of Not Operating Thereunder—Practice—Rules as to Change of Defense Upon Review.**

69b. *Zakas v. Appleton Mfg. Co.*, Gen. No. 6140. *Held*: (1) If the parties were not operating under the Workmen's Compensation Act, the common law action could only be maintained by the plaintiffs averring and proving that fact. (2) The general rule, subject to few exceptions, is that questions of whatever nature not raised and properly preserved for review in the trial court, will not be noticed on appeal. The main exception to this rule is want of jurisdiction. (3) A party cannot in a reviewing tribunal succeed upon a theory of law inconsistent with that upon which he tried his cause in the nisi prius court. (4) A defendant cannot urge a defense in the Appellate Court inconsistent with the defense or defenses he relied upon in the court below. (5) Where a defense is denied by a reviewing court because not presented in the court below, the plaintiff is permitted to recover where he perhaps, or certainly, was not entitled to recover had the defense been there made. Affirmed. (CARNES, J.)

**Pleading—When Special Pleas Are Demurrable—Pleas Presenting Only Partial Defense—Negotiable Instruments—Right of Surety to Have His Security Maintained Unimpaired—Evidence—Parol Evidence—When Admissible.**

70b. *Kopf v. Yordy*, Gen. No. 6090. *Held*: (1) Where a special plea presents for issue matters which are already at issue under the general issue, a demurrer to the plea is properly sustained. (2) Where a plea amounts only to a partial defense to the action, but professes to answer the whole of the declaration, and purports to present a defense to the whole of a plaintiff's demands, it is obnoxious to general demurrer. (3) If the holder of a bill or note, by his laches, has deprived the surety of the benefit of his security, the surety has the right to plead the injury suffered and resulting from such laches or neglect, in defense, against a recovery by the holder on the bill or note to the extent of the injury suffered. (4) Evidence of contemporaneous verbal declarations and conversations cannot properly be admitted for the purpose of changing or varying a liability which the law attaches to a writing or contract. (5) The name of the payee appearing on the back of the instrument is evidence that he is endorser and proves that he assumed the liability of an indorser, as fully as if the agreement were written out in words; and it is inadmissible to show the parties intended a different contract than that implied by the law from their acts. (6) It is competent to show by oral evidence the execution of a written instrument. (7) Oral evidence of what took place at the time of signing of a written instrument may sometimes be a part of the *res gestae*. (8) Oral evidence is admissible for the purpose of establishing a trust, in connection with a written instrument, or showing the circumstances under which an indorsement was made, or to prove fraud. Reversed. (NIEHAUS, J.)

**Contracts—Covenant Defined—Time When Breach Occurs—Time from Which Statute of Limitations Begins to Run—Section Twenty. Statute of Limitations, Construed—Interest—Right of Defendant When Defaulted to Introduce Evidence Tending to Reduce Damages—Right of Appellate Court to Correct Amount of Damages.**

72b. *Chicago Mill & Lumber Co. v. Townsend*, Gen. No. 6216. *Held*:

(1) A covenant is a species of express contract. (2) No breach of covenant occurs, and no cause of action accrues to the grantee until the time he is actually evicted by the holder of the paramount title; and the grantee cannot maintain suit against the grantor until that time. (3) The Statute of Limitations does not begin to run until the cause of action has accrued. (4) The Statute of Limitations of another state does not apply unless the parties were non-residents of Illinois at the time the cause of action accrued. (5) Where a contract for the payment of money contains a stipulation for the recovery of interest, but does not either expressly or impliedly fix a time from which such interest is to be computed, the interest should be computed from the date of the contract. (6) Where a grantee's right to recover reasonable attorney's fees and costs incurred and paid by him is based on an instrument in writing, he is also entitled to recover interest on the payments made in that regard at the rate of 5 per cent per annum from the date of payment, under Sec. 2, Chap. 74 of the Revised Statutes. (7) While a defendant has a right, though defaulted, to introduce evidence tending to reduce the amount of damages claimed, he is not entitled to introduce evidence by way of set-off. (8) While it is apparent that the judgment rendered is not for the proper amount of damages to which plaintiff is entitled, and is, therefore, partly erroneous, the Appellate Court has the power to render such a judgment as the trial court should have rendered. *Reversed on cross errors.* (NIEHAUS, J.)

**Affirmed on the Facts.**

73b. *Burkheimer v. C., R. I. & P. Ry. Co.*, Gen. No. 6210. *Affirmed* on a review of the record. (CARNES, J.)

**Bulk Sales Act Construed.**

74b. *Larson v. Judd*, Gen. No. 6172. *Held*: The act does not contemplate that one called on to render personal services cannot sell the chattels, goods or other things that are appurtenant thereto unless the conditions imposed by the act are complied with. *Affirmed.* (CARNES, J.)

**Evidence—Scope of Cross-Examination.**

75b. *O'Connor v. Kennedy*, Gen. No. 6171. *Held*: Matters which were not the subject of the examination-in-chief and which do not appear to be material in the determination of the important question of the controversy cannot be gone into on cross-examination. *Affirmed.* (NIEHAUS, J.)

**Practice—Procedure Upon Denial of An Injunction.**

76b. *Kreis v. County of Rock Island*, Gen. No. 6168. *Held*: Upon denial of an injunction the court should not dismiss a bill before any pleading by defendants, unless it appears from the bill that it could not be so amended as to state a case in equity. *Reversed.* (DIBELL, P. J.)

**Affirmed on the Facts.**

77b. *Jarvis v. G. & J. Coal Co.*, Gen. No. 6203. *Affirmed* on a review of the record. (DIBELL, P. J.)

**Reversed on the Facts.**

78b. *People v. Herrick*, Gen. No. 6229. *Reversed* on a review of the record. (*Per Curiam.*)

## APPELLATE COURT DIGEST

**Affirmed on the Facts.**

79b. *Clendenin v. Adams Express Co.*, Gen. No. 6282. Affirmed on a review of the record. (*Per Curiam.*)

## IN THE THIRD DISTRICT

(Opinions Digested by Student Editor John L. Turnbull.)

OPINIONS FILED APRIL 21, 1916.

### Administration of Estates—Rights of Secured Creditor—Homesteads.

1c. *Dyer v. Hall*, Gen. No. 6373. *Held*: (1) It is proper for the holder of a secured claim to present the same for allowance in the Probate Court where the estate is being administered, or he may resort to his security, or he may pursue both methods. (2) The estate of homestead is not now a mere exemption, but is an estate in the land, and when its boundaries have once been fixed, a rule which would permit it to be cut down on account of subsequent enhancement in value, or to be added to in case of depreciation, would be impracticable and lead to much embarrassment. Affirmed. (GRAVES, J.)

### Practice—Case for Jury—Burden of Disproving Prima Facie Case.

2c. *Stewart v. Illinois Central R. R. Co.*, Gen. No. 6379. *Held*: (1) When there is any evidence in the record from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all the material averments in the declarations have been proven, the case should go to the jury. (2) Where there is evidence in the record sufficient to make a *prima facie* case under the above, the burden of overcoming that *prima facie* case is on the defendant. Affirmed. (GRAVES, J.)

### Fraternal Orders—Function of Courts.

3c. *German v. Supreme Tribe of Ben Hur*, Gen. No. 6384. *Held*: With the merits of controversies affecting the internal government of fraternal orders, the courts will not interfere. Reversed and remanded. (GRAVES, J.)

### Torts—Action for Death—Instructions to Jury.

4c. *Gehrig v. C. & A. R. R. Co.*, Gen. No. 6386. *Held*: (1) Error to instruct that the coroner's verdict was admitted solely for purpose of proving death and not as to time and manner. (2) Error to instruct the jury that no juror should consent to a verdict which does not meet with the approval of his own judgment. This is a suggestion or bid for a disagreement. Reversed and remanded. (THOMPSON, J.)

### Statutes—Repeal by Implication.

5c. *Cook v. Augustus*, Gen. No. 6387. *Held*: Repeals by implication are not favored, and both statutes will remain in force unless they are so repugnant that they cannot operate together. Reversed and remanded. (GRAVES, J.)

### Pleading—Power of Trial Court—Striking from Files.

6c. *Mathers v. Schuessler*, Gen. No. 6400. *Held*: (1) When issues have been made upon a declaration and a plea, it is a matter of discretion with the trial court whether leave to file additional pleas shall be allowed, and when such additional pleas present new issues, leave to file them should be denied, unless a showing is made of some reasonable excuse why the same was not filed earlier. (2) It is not error to strike from the files a plea that has been filed without leave of court. Affirmed. (GRAVES, J.)

**Contracts—Collateral Guaranty—Notice of Default—Construction and Scope of Guaranty.**

7c. *Heberling Medicine & Extract Co. v. Smith*, Gen. No. 6401. *Held*: (1) Where the guaranty is a collateral, continuous one, the guarantors are entitled to a reasonable notice of the default of the principal debtor unless they had expressly or impliedly waived such notice, or unless the circumstances were such that they were not prejudiced for want thereof. (2) A creditor is not required to give notice of default to a guarantor where the guarantor has notice from an independent source. (3) A contract of guaranty will receive strict construction in regard to the subject matter embraced in the guaranty, and in this respect the undertaking of a guarantor is to be considered strictly, and he is bound to the extent and in the manner and under the circumstances pointed out in his obligation, and no farther. His liability will not be extended by implication. Reversed with judgment here. (ELDRIDGE, P. J.)

**Master and Servant—Violation of Mining Act—Contributory Negligence.**

8c. *Nagall v. Shoal Creek Coal Co.*, Gen. No. 6412. *Held*: Contributory negligence is no defense where the charge is the willful violation of the mining act. Affirmed. (GRAVES, J.)

**Contracts of Sale—Breach of Warranty—Doctrine of Caveat Emptor.**

9c. *Wells v. Graham*, Gen. No. 6415. *Held*: If the seller, knowing that the horse was permanently diseased, warranted the horse to be sound and all right, and told the buyer that the lameness was caused by an injury to the frog of the foot made by a stone, and would get well, when he knew such representation to be false, and that the buyer relied on the representation of the seller and had no information to the contrary, the doctrine of caveat emptor does not apply. Affirmed. (THOMPSON, J.)

**Printing of Primary Election Ballots—Duty of County Clerk—Liability of County for Costs.**

10c. *Bennett v. County of Clark*, Gen. No. 6417. *Held*: The law clearly makes it the imperative duty of the county clerk to cause primary ballots to be printed. This duty he must perform whether the County Board makes provisions for defraying the expenses or not. When in the performance of that duty he violates no law or contract or rule of the County Board, the county is clearly liable for the expense he incurs in so doing. Affirmed. (GRAVES, J.)

**Judgment Notes—Affidavit Suits Pending.**

11c. *Stauffer v. State Bank of Mansfield*, Gen. No. 6422. *Held*: (1) Where the affidavit does not show any defense to the note, the judgment will not be opened up for the purpose of permitting a set-off. (2) A suit in equity is not considered as pending until summons has been issued and an effort made to secure service. If the judgment at law was entered before the summons in equity was issued, then the suit in equity was not a pending action so as to abate the suit at law. Affirmed. (ELDRIDGE, P. J.)

**Bills and Notes—Accord and Satisfaction.**

12c. *Walker v. Schertz*, Gen. No. 6423. *Held*: The sending of a check by a maker to a payee, as a payment in full of the balance due on a note, and the acceptance by the payee of such check, amounts to an accord and satisfaction. If payee does not wish to accept the amount named in the check for the purposes and upon the conditions named therein, or accompanying it, it is his duty to return it. Reversed with finding of fact. (GRAVES, J.)

## APPELLATE COURT DIGEST

### Corporations—Right to Void Sale of Stock to An Individual.

13c. *Kelly v. McCormick-Murray Mfg. Co.*, Gen. No. 6429. *Held*: A corporation cannot urge in defense of a suit by a party who was at one time a stockholder, that the stockholder fraudulently over-valued property turned over to the corporation in payment of a stock subscription, while such fraud would render the transaction voidable as to creditors and other stockholders prejudiced thereby, it is binding upon the corporation and as between the corporation and such stockholder, the stock subscription is fully paid. Affirmed. (THOMPSON, J.)

### Affirmed on the Facts.

14c. *Tucker v. Warner*, Gen. No. 6430. Affirmed on a review of the record. (ELDRIDGE, P. J.)

### Care of Streets—Duty of Municipality—Duty of Public—Status of Questions of Contributory Negligence and of Negligence.

15c. *McQuoid v. City of Warsaw*, Gen. No. 6431. *Held*: (1) The duty of a municipality in regard to its streets is to use reasonable care to keep them in a reasonably safe condition for the usual and ordinary modes of travel. (2) A party has no right knowingly to expose himself to danger, and then recover damages for an injury which he might have avoided by the use of reasonable care. (3) While questions of negligence or of contributory negligence are ordinarily questions of fact, to be passed upon by a jury, yet when the undisputed evidence is so conclusive that it does not with all reasonable inference tend to prove the cause of action, and the court would be compelled to set aside a verdict in opposition to it, the court may withdraw the case from the consideration of the jury and direct a verdict. Affirmed. (ELDRIDGE, P. J.)

### Pleading.

16c. *Armentrout v. Central Trust Co. of New York*, Gen. No. 6432. *Held*: (1) The law does not presume that a party's pleadings are less strong than the facts of the case will warrant. (2) The court would not be authorized to draw inferences in favor of an appellant that facts exist concerning which the bill contains no allegations. Affirmed. (THOMPSON, J.)

### Reversed on the Facts.

17c. *Wilson v. Denner*, Gen. No. 6433. Reversed and remanded on a review of the record. (ELDRIDGE, P. J.)

### Bills and Notes—Stale Claims Evidence.

18c. *Wolf v. Ellison*, Gen. No. 6435. *Held*: When a stale claim is filed against the estate of a deceased person, evidence that deceased was prompt in the payment of his debts and that he was at all times financially responsible for them, is competent as a circumstance tending to show the unjustness of his claim. Affirmed. (ELDRIDGE, P. J.)

### Bills and Notes—Defense to Plea of Statute of Limitations.

19c. *Longenbach v. Cole*, Gen. No. 6437. *Held*: Where the statute of limitations is relied on as a defense, the bill must, either by original averment or by amendment, show some fact that prevents the running of that statute. Affirmed. (GRAVES, J.)

### Reversed on the Facts.

20c. *Graff v. Moench*, Gen. No. 6438. Reversed and remanded on a review of the record. (ELDRIDGE, P. J.)

**Insurance Policies—Agency—Liability of Principal.**

21c. *Cech v. Firemen's Ins. Co.*, Gen. No. 6441. *Held*: An insurance company cannot avoid liability because of the mistake of its agent in misdescribing the location of the property where its location was fully made known to him. *Affirmed.* (THOMPSON, J.)

**Master and Servant—Injury to Servant While in Employ of Master—Declaration—Instructions.**

22c. *Lindebaum v. Sells-Floto Shows Co.*, Gen. No. 6442. *Held*: (1) When suit is begun by a servant against his master to recover for personal injuries resulting from negligence, and the negligence charged is that of another servant of the same master, the declaration must either expressly aver that such two servants of a common master were not fellow-servants, or must aver facts which negative such relation. (2) When an instruction directs a verdict upon proof of certain facts, it must omit no element necessary to recovery. *Reversed and remanded.* (GRAVES, J.)

**Decree for Alimony—Nature of Lien Against Defendant's Property—Purchaser for Value from Judgment Debtor.**

23c. *Wallace v. Wallace*, Gen. No. 6444. *Held*: (1) Where a decree for alimony does not make such alimony a lien on land which is described in the decree, the lien of such decree is that of a decree *in personam* and not of a decree *in rem*. (2) A decree for money which does not make its payment a lien on certain described tracts of land and which is a lien by virtue of Section 44 of the Chancery Act is a lien to the same extent and under the same limitations as a judgment at law. A judgment at law ceases to be a lien on the real estate of the person against whom it is entered, unless within a year from the time it became a lien an execution is issued on such judgment and the lien may be revived by issuing an execution and placing it in the hands of the sheriff. (3) A purchaser of real estate from a judgment debtor more than a year after a judgment was rendered, upon which no execution has been issued, takes the land freed from any lien of the judgment. *Affirmed.* (THOMPSON, J.)

**Reversed in Part and Affirmed in Part on the Facts.**

24c. *Modern Woodmen of America v. Scott*, Gen. No. 6446. *Reversed in part and affirmed in part on a review of the record.* (ELDRIDGE, P. J.)

**Insurance—Contract Made in One State, with Corporation in Another State—Right of Insurer's to Amend By-laws.**

25c. *Mohlman v. Business Men's Accident Assn. of America*, Gen. No. 6448. *Held*: (1) Where the situs of a contract is in one state, it is to be construed according to the laws of that state. (2) A certificate of membership in a benefit society which provides that the member shall be bound by the laws, rules and regulations then in force, or which may thereafter be enacted, sufficiently reserves the right of the society to amend existing by-laws. (3) A party cannot claim the right to have a contract remain unaltered when the contract itself provides it may be changed. *Affirmed.* (THOMPSON, J.)

**Bill for Partition of Real Estate—Bill for Review—Rulings of Chancellor.**

26c. *Nokomis Natl. Bank v. Elmers*, Gen. No. 6449. *Held*: (1) Unless the party bringing the cause up for review shall not only present a record containing all that is necessary for the court to know in order to pass intelligently upon the questions presented, but shall also file an abstract or abridgement of that record from which the errors complained of can be discovered, the judgment of the lower court will be affirmed *pro forma*.



## APPELLATE COURT DIGEST

Courts of review will never go to the record to discover errors not shown by the abstract, but will inspect it to find reasons to effrom. (2) Findings of fact of a chancellor should not be set aside as against the weight of the evidence, unless they are clearly and palpably so. Affirmed. (GRAVES, J.)

### Separate Maintenance—Alimony—Liens for Payment.

27c. *Cash v. Cash*, Gen. No. 6450. *Held*: It is proper to order that an allowance for alimony and solicitor's fees in a suit for separate maintenance be declared a lien on certain real estate of the defendant, but a court of chancery has no power to make a decree for alimony and solicitor's fees a lien on personal property. Affirmed in part and reversed in part. (ELDRIDGE, P. J.)

### Mortgages—Strict Foreclosure—When Allowed.

28c. *Rexroat v. Ford*, Gen. No. 6451. *Held*: While it is a general rule that, where there are other creditors, strict foreclosures are not favored in equity, yet the rule is not an arbitrary one. A strict foreclosure may be allowed where there are other creditors and the property is of less value than the debt, the mortgagor is insolvent, and the mortgagee is willing to take the property in discharge of his debt. Affirmed. (THOMPSON, J.)

### Contracts—Construction of Ambiguous Terms.

29c. *Illinois Central Traction Co. v. Herman*, Gen. No. 6452. *Held*: Although there be doubts as to how a contract independently would be construed, yet where the construction adopted by the parties in performance is a reasonable one, the courts are justified in adopting such construction. Affirmed. (GRAVES, J.)

### Affirmed on the Facts.

30c. *City of Lincoln v. St. Louis, Springfield & Peoria Ry. Co.*, Gen. No. 6453. Affirmed on a review of the record. (ELDRIDGE, P. J.)

### Separate Maintenance—Findings of a Master.

31c. *Buchan v. Buchan*, Gen. No. 6454. *Held*: In matters other than stating accounts, the rule is that the master's conclusions are simply advisory and only prima facie correct, and the court upon objections filed may modify or reject the report if it is erroneous, defective, or against the weight of the evidence. Reversed and remanded with directions. (THOMPSON, J.)

### Mechanics' Lien—When Granted—Construction of Conveyance.

32c. *Alexander Lumber Co. v. The Champaign Baseball Club*, Gen. No. 6455. *Held*: (1) Before a petitioner would be entitled to have a lien on the premises, it must appear both by averment and proof that the materials furnished were for the construction of something that was to become part of or be an improvement on the real estate, as distinguished from such things as when completed still retain their character as personal property, and that the petitioner has an existing right to compensation therefor. (2) A conveyance absolute on its face will not be construed to be a conditional one except on competent proof which clearly shows that the intention of the parties was that the same should be conditional. Affirmed. (GRAVES, J.)

### Affirmed on the Facts.

33c. *Seals v. Henderson*, Gen. No. 6458. Affirmed on a review of the record. (GRAVES, J.)

### Personal Injuries—Can Negligence of Taxi-Cab Chauffeur Be Imputed to Passenger?—Pleading—Surplusage.

34c. *Kackley v. Central Ill. Traction Co.*, Gen. No. 6459. *Held*: (1)

Negligence of the driver of a vehicle with whom the injured person is riding and who is not the agent or servant of such person will not be imputed to such injured person. (2) It is unnecessary to aver due care on the part of the chauffeur. (3) Where unnecessary allegations are made in the declaration, which are foreign and irrelevant to the cause, they will be rejected as surplusage, and need not be proved. Reversed and remanded. (ELDRIDGE, P. J.)

**Affirmed on the Facts.**

35c. *Hall v. Corn Belt Bank*, Gen. No. 6461. Affirmed on a review of the record. (GRAVES, J.)

**Broker and Client—Speculations in Grain—Gambling Contracts.**

36c. *Lamson v. West*, Gen. No. 6462. *Held*: A pretended purchase or sale of grain made through a broker, when neither the broker or his client intends or expects that as between them the commodity will be delivered or received, but both of them do intend that the losses or profits of the transactions shall be determined by the difference between the market price of the same when the deal is opened and when it is closed, or, in other words, when the intention is that the client shall win or lose money on the fluctuations of the market, it is as between them a gambling contract, and unenforceable and the broker cannot recover his commissions. Reversed and remanded with directions. (GRAVES, J.)

**Real Property—Sale for Payment of Debts—Fraud in Letters of Administration.**

37c. *Rice v. Davies*, Gen. No. 6464. *Held*: The fact that an administrator may not have been lawfully appointed does not have the effect of abating the proceedings to sell real estate for the payment of debts, and even if an administrator is removed after a petition has been filed to sell real state to pay debts, the proceeding is only delayed until a proper administrator is appointed to proceed. Affirmed. (ELDRIDGE, P. J.)

**Affirmed on the Facts.**

38c. *Morrison v. Dasy*, Gen. No. 6465. Affirmed on a review of the record. (THOMPSON, J.)

**Reversed on the Facts.**

39c. *Mills v. Warner, Extr.*, Gen. No. 6466. Reversed on a review of the record. (GRAVES, J.)

**Live Stock Insurance—Compliance with Terms of Policy.**

40c. *Hooper v. Kaskaskia Live Stock Ins. Co.*, Gen. No. 6467. *Held*: A provision in a policy of live stock insurance requiring the insured to notify the company without delay of the illness of the animals insured has been declared to be a reasonable one. Reversed. (ELDRIDGE, P. J.)

**Interlocutory Orders—Appeal.**

41c. *Warner v. Wagner*, Gen. No. 6469. *Held*: An interlocutory order dissolving a temporary injunction without an order dismissing the bill is not appealable. Appeal dismissed. (GRAVES, J.)

**Constructive Fraud—Motive and Intent.**

42c. *Taylor v. Foley*, Gen. No. 6470. *Held*: It is fraud in law if a party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad. Nor is it necessary that they were made with a design or intention to cause injury to the other party. Affirmed. (ELDRIDGE, P. J.)

## APPELLATE COURT DIGEST

### **Criminal Prosecutions—Right of Defendant to Refuse to Testify.**

43c. *People v. Moore*, Gen. No. 6471. *Held*: A witness is not bound to answer any question which might expose him to penalty or have a tendency to accuse him of any crime or which will be a link in a chain of evidence to convict him of a criminal offense, and whenever a witness is excused from giving testimony upon such grounds, he cannot be compelled to produce books or papers which will have the same effect. Reversed and remanded. (ELDRIDGE, P. J.)

### **Reversed on the Facts.**

44c. *People v. Ermovich*, Gen. No. 6472. Reversed and remanded on a review of the record. (THOMPSON, J.)

### **Bills and Notes—Judgment by Confession—Collateral Undertakings as to Payment and Security—Material Alteration.**

45c. *Heldman v. Gunnell*, Gen. No. 6478. *Held*: (1) The acceptance of collateral security has no effect whatever on the legal rights and liabilities of the parties, as respects the original debts, either to impair or suspend the right of action thereon. Hence the detachment of the statement of such collateral security is not a material alteration, and may be disregarded. (2) Where a note sued on, and an agreement as to time and manner of payment are executed at the same time between the same parties, and respective the same subject matter, they must be construed together and considered as forming but one contract, and the detachment by a holder of such an agreement is a material alteration thereof. Reversed and remanded. (ELDRIDGE, P. J.)

### **Partnership—Compensation to Partners for Work in Winding Up Affairs—Arbitration—Prior Decree Against One Partner—Rights of One Co-Partner Against the Other.**

46c. *Williams v. Henkle*, Gen. No. 6480. *Held*: (1) While ordinarily extra compensation is not allowed to partners for services in winding up a partnership, it may be allowed under special circumstances. (2) Parties are precluded from litigating further the matters considered and passed upon in the arbitration. (3) On a bill for an accounting between partners, it is not proper to render a personal decree against one partner for the excess of his receipts over his disbursements until his interest in the firm assets have been exhausted. There should be a complete adjustment of the partnership accounts and a disposition of all partnership property, leaving nothing for subsequent settlement. (4) One partner cannot maintain an action against his co-partner for an accounting as to particular items or transactions, but partners may make a partial settlement by arbitration, at any time. Reversed and remanded. (GRAVES, J.)

### **Assault and Battery—Evidence In Case for Exemplary Damages—Malice Presumed—Certainty of Proof—Declaration—Remittitur—Instructions to Jury—Prior Threats.**

48c. *Hinton v. Muhlman*, Gen. No. 6488. *Held*: (1) In all cases where exemplary damages are recoverable, the pecuniary resources and financial condition of the defendant are elements for the jury to consider in estimating and assessing the damages. (2) When an assault and battery is made wantonly and willfully, or maliciously, or with undue violence, exemplary damages are authorized, and malice will be inferred where the act is done with a reckless disregard of the rights of the person assaulted. (3) When damages are of such character as to be susceptible of being proven by direct and positive evidence, such proof must be made showing the exact amount thereof. This class embraces liabilities to physicians incurred or paid in attempting to be cured of the injuries and are susceptible of proof. (4)

While not only the expenses necessarily paid by one injured in endeavoring to be cured, but also all like expenses occurred or become liable for can be recovered, yet no recovery can be had for expenses incurred and not paid unless they are set out in the declaration as an element of damages. (5) While the defendant has a right to the judgment of the jury as to the amount of damages on legitimate evidence, it has frequently been held that an error affecting damages only can be cured by remittitur. (6) When a party litigant offers an unreasonable number of instructions for a trial court to pass upon, the trial court cannot be expected in the hurry of the trial to give them extensive consideration and the judgment will not be reversed for an error in refusing to give some of the instructions if upon consideration of these instructions it can be seen that the jury was fully informed as to the law of the case. (7) Under the facts in this case, evidence of prior threats was held to be inadmissible. Affirmed with remittitur. (ELDRIDGE, P. J.)

**Reversed with Finding of Facts.**

49c. *Sutton v. Hance*, Gen. No. 6487. Reversed with finding of fact on a review of the record. (GRAVES, J.)

**Reversed on the Facts.**

50c. *Kurtz v. Evans*, Gen. No. 6489. Reversed and remanded on a review of the record. (ELDRIDGE, P. J.)

**Affirmed on the Facts.**

51c. *Pugh v. Palmer*, Gen. No. 6490. Affirmed on a review of the record. (THOMPSON, J.)

**Personal Injuries—Averment of Due Care—Elements of Damage—Cross-Examination—Hypothetical Questions—Bill of Exceptions.**

52c. *Conrad v. St. Louis, Springfield & Peoria R. R.*, Gen. No. 6491. *Held*: (1) The law requires that one claiming to be injured must aver and prove that he or she was not only exercising due care at the time or instant of the injury, but while getting into the situation where the injury was received. (2) Both evidence and instructions should be limited to damages declared on, but where evidence is introduced without objections or issues not made by the pleadings or where there is no evidence offered on issues not included in the pleadings, the giving of such an instruction cannot be held to be a reversible error. (3) On cross-examination of any expert witness any fact which in the sound discretion of the court is pertinent to the inquiry, whether the same has been testified to or not, may be assumed in a hypothetical question to test the accuracy, learning or skill of the witness. (4) What is done by the judge, or in his presence, is within his knowledge and must be recited in a bill of exceptions over his certificate, and cannot be made a part of the record by *ex parte* affidavits. Reversed and remanded. (GRAVES, J.)

**Assault and Battery—Necessary Elements.**

53c. *McGlothlin v. Peters*, Gen. No. 6495. *Held*: To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness, must mingle in the controversy. The act complained of must partake of a criminal or wanton nature. Reversed and remanded. (ELDRIDGE, P. J.)

**Personal Injuries—Necessity to Show Due Care—Burden of Proof.**

54c. *Sunnes v. Illinois Central R. R. Co.*, Gen. No. 6498. *Held*: The burden is on a plaintiff to show that he was in the exercise of due care for his own safety, and unless he does that he cannot recover in an action

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for injuries sustained by him. Reversed with finding of fact. (THOMPSON, J.)

### School Districts—Rights of Taxpayers in District—Powers of Board of Education—Restrictions.

55c. *Stroh v. Casner*, Gen. No. 6499. *Held*: (1) Owners of property and taxpayers in a township high school district may maintain a bill to enjoin the performance of a contract made by such district and claimed to be void, when the performance of it would affect the rights generally of the taxpayers of that school district. (2) School districts are municipal corporations and as such they have only such powers as are expressly granted to them by statute or such as are necessary to carry into effect such granted powers. (3) Any contract between a board of education of a township high school by which it is attempted to delegate or to share any of its discretionary powers with a board of directors of a school district, is void, and if the performance of such contract involves the expenditure of the money of either of such districts its performance may be restrained by injunction at the instance of a taxpayer of such district. Reversed and remanded with directions. (GRAVES, J.)

## IN THE FOURTH DISTRICT

(Opinions Digested by Student Editor Samuel Segal.)

OPINIONS FILED APRIL 17, 1916.

### Evidence—Question Assuming a Point in Dispute—Insurance—Inclination Is Against Forfeiture.

1d. *Bonner v. Milwaukee Mechanics' Ins. Co.*, Term No. 17. *Held*: (1) It is proper to sustain an objection to a question which assumes the very matter in dispute. (2) Where an insurance policy provides for a forfeiture where the goods insured shall become insured in another company, there will be no forfeiture if one later buys something of such a value that it cannot reasonably be said to have been included under the original policy. Affirmed. (MCBRIDE, J.)

### Carriers—Passenger Relation Exists While Walking from One Car to Another—Degree of Care Required—Evidence—Opinion on An Ultimate Fact.

2d. *Horst v. St. Louis Electrical Terminal Ry. Co.*, Term No. 29. *Held*: (1) Where one purchases transportation to a certain point, and during passage he is told to get off the car and take another car a block away, as the first car did not go any farther, the relation of carrier and passenger continues while he is walking from one car to the other. (2) Under such circumstances the highest degree of care and caution consistent with the practical operation of the road for the safety and security of the passenger while being transported is required. (3) Where there is a conflict in the evidence as to whether the plaintiff was injured in the manner claimed, it is not competent for witnesses to give their opinions on that subject. Reversed and remanded. (MCBRIDE, J.)

### Reversed on the Facts.

3d. *Morrison et al. v. Pickrell Walnut Co.*, Term No. 64. Reversed and remanded on a review of the record. (MCBRIDE, J.)

MARCH TERM, A. D. 1915.

**Proof to Sustain Possessory Damages—Jury May Estimate Damage Caused by One of Many Wrongdoers—No Right to Pollute Stream—Right to Stream in Its Natural Condition.**

4d. *Thomas v. Ohio Oil Co.*, Term No. 5. *Held*: (1) Where one claims possessory damages he need only prove he was in possession at the time of the injury. (2) Where several contribute to the damage and it is difficult to ascertain the damages caused by each, the jury may make a reasonable estimate. (3) No one can directly or indirectly, even though in the pursuit of a legitimate business, foul or pollute a stream of water and thereby damage a lower proprietary owner without rendering himself liable for damages. (4) Owner of land through which a stream of water flows is entitled to the use and enjoyment of said water and to have the same flow in its natural state without interruption or pollution. Affirmed (Boggs, J.)

**Negligence—Failure to Look and Listen Not Conclusive Exercise of Due Care Before Time of Injury—Limitation of Damages to Those Pecuniary Necessity of Brakeman a Question for the Jury.**

5d. *Hanman, Admr., v. I. C. R. R. Co.*, Term No. 21. *Held*: (1) A failure to look and listen is evidence of negligence, but is not conclusive so that a charge of negligence can be predicated upon them as a matter of law. (2) Under certain circumstances it is necessary to instruct the jury that due care must be exercised prior to as well as at the time of the injury. (3) An instruction, "Assess damages at such sum as you believe from the evidence the widow and next of kin have sustained by reason of the death of deceased, if any," limits the damages to the pecuniary loss. (4) It is a question for the jury as to whether it is necessary to have a brakeman on a car. Affirmed. (McBRIDE, J.)

**Negligence—Care Required of a Child—Mother's Negligence No Bar to Child Recovery.**

6d. *Lovar, Minor, etc., v. Ind. Breweries Co.*, Term No. 34. *Held*: (1) A child is not required to use that degree of care that would be exercised by an ordinary prudent person under like circumstances. (2) A child is not bound by the negligent conduct of its mother where the action is brought for the benefit of the child. Affirmed. (Boggs, J.)

**Instruction to Disregard Counts Not Sustained by the Evidence.**

7d. *Bagoini v. Donk Bros. Coal & Coke Co.*, Term No. 41. *Held*: Where there is no evidence to sustain certain counts in a declaration, it is error or refuse to instruct the jury to disregard those counts. Reversed and remanded. (Boggs, J.)

**Fellow-Servants—When Such Relationship Exists—Question of Fact.**

8d. *Montegard v. Donk Bros. Coal & Coke Co.*, Term No. 75. *Held*: The fact that two men work in the same entry, hauling cars over the same track, and performing the same general character of work for a common master, does not necessarily make them fellow-servants, as it is a question of fact. Affirmed. (McBRIDE, J.)

**Proximate Cause—Need Not Be Sole Cause.**

9d. *Stone v. Donk Bros. Coal & Coke Co.*, Term No. 76. *Held*: When an injury proceeds from two causes operating together, the parties putting in motion one of them are liable, and if it is an essential cause it need not be the sole cause. Affirmed. (Boggs, J.)

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### Affirmed on the Facts.

- 10d. *Morgan, Admr., v. Carterville & Big Muddy Coal Co.*, Term No. 81. Affirmed on a review of the record. (Boggs, J.)

### Bill of Exceptions—Must Contain Motion for New Trial.

11d. *Brown v. Parahan Hat Co.*, Term No. 5. *Held*: Where trial is by jury, the errors relied on for a reversal on appeal must first have been brought to the notice of the trial court by a motion for a new trial, that they may be corrected in that court, and that must appear in the bill of exceptions. Affirmed. (HIGBEE, P. J.)

### Wife's Loss of Support—Recovery for the Future.

12d. *Brown v. Moudy et al.*, Term No. 6. *Held*: If the ability of a husband to earn a livelihood for his wife has been lessened by the intoxicating liquor sold by a defendant, it effects the wife's future support, for which she would have a right of recovery. Affirmed. (Boggs, J.)

### Change of Venue—All Defendants Must Verify Petition—Time When Cause of Action Arises on Bond of Clerk—Evidence—Copies of Bonds Competent—Judgment form Not Essential.

13d. *People ex rel, Gobin, etc., v. May, Jr., et al.*, Term No. 7. *Held*: A petition for a change of venue on the ground that the judge is prejudiced is insufficient unless signed and verified by all the defendants. (2) In a suit for damages caused by a clerk of court in unlawfully approving an appeal bond, the cause of action arises on the affirmance of judgment and not when the bond is approved. (3) Sec. 7, Chap. 124 of Rev. Stat. permits copies of bonds of circuit clerks deposited with the Secretary of State to be received in evidence the same as the original when authenticated by the seal of office of the secretary. (4) A judgment showing the relief granted, in whose favor and against whom, the amount of the judgment, and that it was rendered by the court, contains all the necessary elements for a valid judgment and should not be reversed for mere informalities. Affirmed. (HIGBEE, P. J.)

### Affirmed on the Facts.

14d. *Albrecht & Co. v. Warring, etc.*, Term No. 9. Affirmed on a review of the record. (McBRIDE, J.)

### Insurance—Waiver of Forfeiture—Question of Fact.

15d. *Mason v. Illinois Bankers' Life Association of Monmouth, Ill.*, Term No. 10. *Held*: (1) An insurance company has the option to waive a condition or stipulation made in its own favor. (2) It is a question of fact for the jury to determine from the evidence whether or not there was a waiver of forfeiture. Reversed and remanded (McBRIDE, J.)

### Insurance—Wife of Beneficiary an Incompetent Witness—Instructions as to Right to Disregard Evidence of One Who Swears Falsely.

16d. *Neeley v. Metropolitan Life Ins. Co.*, Term No. 11. *Held*: (1) Under Sec. 5, Chap. 51 of Hurd's Rev. St., the wife of the beneficiary, who is the father of the insured, is an incompetent witness. (2) It is error for the court to instruct that if the jury believe from the evidence that one had wilfully sworn falsely at the trial as to anything material, then the jury were at liberty to disregard his entire testimony, except so far as the same might be corroborated by other credible evidence, or facts and circumstances proven on the trial. Reversed and remanded. (Boggs, J.)

**Bastardy—Jurisdiction—Evidence—Acts of Intercourse with Others Limited to Period of Gestation—Conduct of Defendant at Trial as Bearing on Credibility.**

17d. *People, ex rel, Stucker, etc., v. Kirby*, Term No. 13. *Held*: (1) Where acts of intercourse resulting in the conception of a child takes place in a certain county, and the alleged father is served in that county, that county has jurisdiction though the child is born in another county, by Sec. 1, Chap. 17, Hurd's Rev. St. (2) Question as to acts of intercourse with others besides the defendant are improper unless they limit the time to the period of gestation. (3) It is not error to instruct the jury that in determining the weight that they should give to defendant's testimony, they should consider his conduct at the trial so far as the same is disclosed by the evidence. Affirmed. (BOGGS, J.)

**Trespass—Nominal Damages Where There Is No Proof as to the Extent of the Injury.**

18d. *Schuls v. Kaiser*, Term No. 14. *Held*: Every unauthorized entry upon the lands of another is a trespass, for which an action will lie, and the law implies damages to the owner, and in the absence of proof as to the extent of the injury is entitled to recover nominal damages. Reversed and remanded. (HIGBEE, P. J.)

**Evidence—Admissibility of Paper Purporting to Be a Bill Filed and Writing Purporting to Be a Decree.**

19d. *Virgin v. Hermann*, Term No. 15. *Held*: (1) In order for a paper, purporting to be a bill filed in a chancery case, to be admissible there should be proof that it was the original bill filed in that case, or that it was a part of the files. (2) In order for a writing, purporting to be a decree of a court, to become admissible as a copy of the decree, it should have been certified to as such under the seal of the clerk of the court. Reversed and remanded. (MCBRIDE, J.)

**Affirmed on the Facts.**

20d. *Parker et al. v. Conover et al.*, Term No. 16. Affirmed on a review of the record. (HIGBEE, P. J.)

**Landlord and Tenant—Relation Does Not Exist When Lease Is Subsequent to Mortgage.**

21d. *Reichert et al. v. Bankson*, Term No. 17. *Held*: When a lease is subsequent to a mortgage, there is no privity between the mortgagee and the lessee, and no right in him to demand the rent reserved by the lease. Affirmed. (BOGGS, J.)

**Reversed on the Facts.**

22d. *Leiberich v. East St. Louis & Suburban Ry.*, Term No. 18. Reversed and remanded on a review of the record. (HIGBEE, P. J.)

**Reversed on the Facts.**

23d. *Hausafur v. St. Louis, Springfield & Peoria R. R.*, Term No. 20. Reversed and remanded on a review of the record. (HIGBEE, P. J.)

**Affirmed on the Facts.**

24d. *Born v. Schrieber*, Term No. 21. Affirmed on a review of the record. (BOGGS, J.)

**Affirmed on the Facts.**

25d. *Kurrus Livery & Undertaking Co. v. Crossett*, Term No. 22. Affirmed on a review of the record. (HIGBEE, P. J.)



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### Construction of Statute—Burial Expenses—Coroner's Fees.

26d. *Stullken, Admr., etc., v. Sims*, Term No. 23. *Held*: Under Sec. 26 of Chap. 53 of Hurd's Rev. St. the money allowed for burial expenses not a fee to the coroner for causing a body to be decently buried, but is an allowance to the coroner to be expended in giving the deceased a decent burial. *Affirmed.* (Boggs, J.)

### Bill of Exceptions—Signature of Trial Judge Necessary.

27d. *Songer v. Pfeiffer*, Term No. 24. *Held*: The signature of the trial judge is necessary to a proper bill of exceptions, and without it there is no power of review. *Appeal dismissed.* (McBRIDE, J.)

### Authority of Agent to Exercise Power on Condition.

28d. *O'Neal, etc., v. Saline County Coal Co.*, Term No. 25. *Held*: Where the authority of a special agent is limited and depends upon the existence of certain facts or conditions, it devolves upon the agent exercising that power to show that the conditions upon which his right to exercise it depends were then in existence, or that the act had in some manner been ratified by the principal. *Affirmed.* (McBRIDE, J.)

### Assignment of Wages to Be Earned in the Future—Principal and Agent—Authority of Agent to Act Upon a Condition.

29d. *Pearson, etc., v. O'Gara et al.*, Term No. 26. *Held*: (1) One cannot assign wages to be earned in a future employment for which he had not contracted, and such assignment cannot be made by an attorney in fact where the power of attorney is entered into before the contract of employment is made. (2) Where a principal authorizes a special agent to perform an act in the name of the principal upon certain conditions, it then devolves upon the agent to show that those conditions were in existence at the time of the performance of the act, or afterwards waived. *Revised and remanded.* (McBRIDE, J.)

### Affirmed on the Facts.

30d. *Crossley v. St. L., T. M. & S. Ry. Co.*, Term No. 27. *Affirmed* on a review of the record. (McBRIDE, J.)

### Affirmed on the Facts.

31d. *Sandor v. Verhovey Aid Association*, Term No. 28. *Affirmed* on a review of the record. (McBRIDE, J.)

### Affirmed on the Facts.

32d. *Cobine v. C., C. & St. L. Ry. Co.*, Term No. 30. *Affirmed* on a review of the record. (Boggs, J.)

### Damages—Not Given Merely Because One Is Party to Proceedings to Vacate Road—Not Given Where Benefits Exceed Damages—A Taking as Contemplated by Statute.

33d. *Commissioner of Highways of Town of Saline v. Klaus*, Term No. 31. *Held*: (1) One is not entitled to damages merely because he is made a party to a proceeding to vacate a road. (2) If the benefits derived from the vacation of a road or by the construction of a road, so far as lands not taken are concerned, equal or exceed the damages, then there would be no damages. (3) The vacation of a road is not a taking as contemplated by the Eminent Domain Statute or the road and bridge statute, and damages for the vacation of a road, if any, are damages that are to be ascertained as for lands not taken. *Affirmed.* (Boggs, J.)

**Affirmed on the Facts.**

34d. *Lacey v. Lacey*, Term No. 33. Affirmed on a review of the record. (McBRIDE, J.)

**Reversed on the Facts.**

35d. *Koch v. Loudon, etc.*, Term No. 34. Reversed and remanded on a review of the record. (HIGBEE, P. J.)

**Reversed on the Facts.**

36d. *Hawk v. Loudon, etc.*, Term No. 35. Reversed and remanded on a review of the record. (BOGGS, J.)

**Affirmed on the Facts.**

37d. *Hahn v. Easton*, Term No. 36. Affirmed on a review of the record. (BOGGS, J.)

**Bill of Exceptions Must Be Proper to Review the Evidence.**

38d. *Dieckmann, Exr., v. Heirs of Janett*, Term No. 37. *Held*: Where the evidence before the trial court is not preserved in the record by a proper bill of exception, the question whether the finding of the court was in conformity with the evidence produced before that court, cannot be inquired into on appeal. Affirmed. (HIGBEE, P. J.)

**Construction of Statute—Attorney's Fees—Statute Must Be Specific.**

39d. *City of Mound City v. Mason*, Term No. 38. *Held*: (1) Section 10, Chapter 47, of Hurd's Rev. St., providing for the payment of attorney's fees when a petitioner dismisses a petition, only applies where the petition is voluntarily dismissed by the petitioner or where the petitioner fails to pay the compensation within the time fixed by the statute. (2) In the construction of a statute, with reference to the allowance of attorney's fees to be taxed against the opposite party, such statute is in derogation of the common law and there is no right to have such fees taxed unless the provision of such statute clearly warrants the same. Reversed. (BOGGS, J.)

**Contracts—Municipal Corporation—Contract Not in Mode Provided—Interest Against Municipality.**

40d. *Mosiman Plumbing Co. v. Village of Pocahontas*, Term No. 39. *Held*: (1) Where a municipal corporation has the power to contract for certain things, but must do so in a specified mode, though an exercise of the power in a different mode may be restrained, if the officers have so acted and the municipality has received the benefits of the contract, it will be estopped from setting up the irregular mode of contracting. (2) As to municipalities unless there is a specified agreement to pay interest they are not liable for interest. Reversed and remanded unless appellee files remittur of \$112.57 with the clerk of this court within thirty days from date of filing; upon filing remittur affirmed.

**Carrier—Care Owing to Passenger.**

41d. *Bourland v. L. & N. R. R. Co.*, Term No. 40. *Held*: When a person becomes a passenger of a railroad company, it then becomes the duty of the company to use the highest degree of care for the protection of said passenger, consistent with the practical operation of its road. Affirmed. (BOGGS, J.)

**Bills and Notes—Consideration.**

42d. *Ripe v. Schmidt*, Term No. 41. *Held*: Where a will is made on a son's promise to pay a daughter a certain amount the making of the will

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is a sufficient consideration for a promissory note given by the son to the daughter. Affirmed. (BOGGS, J.)

### **Assignment of Wages to Be Earned in Future—Power of Attorney Before Contract.**

43d. *Ellis, etc., v. Saline County Coal Co.*, Term No. 42. *Held*: (1) One may not assign wages to be earned in a future employment for which he has not contracted at the time of assignment. (2) One may not assign his wages by an attorney in fact authorized by power of attorney entered into before the contract of employment is made. Affirmed. (MCBRIDE, J.)

### **Compensation Act—Must Reject as Provided by the Act—Presumption of Acceptance—Must Proceed According to the Act When Accepted—Insufficient Declaration Not Cured by Verdict.**

44d. *Yeaney v. Taylor Coal Co.*, Term No. 45. *Held*: (1) All employers and employes come under the Compensation Act automatically, unless they reject it as provided in the Act. (2) Where there is no averment in a declaration that the Act was rejected there is a legal presumption that it has been accepted. (3) If one operates under the Compensation Act then another would be unable to state a cause of action against the former at law, and he must proceed as provided by the Act. (4) Where a declaration fails to state a cause of action it will not be cured by verdict. Reversed and remanded. (HIGBEE, P. J.)

### **Affirmed on the Facts.**

45d. *McIntire v. Morris & Lindsey*, Term No. 46. Affirmed on a review of the record. (HIGBEE, P. J.)

### **Civil Action—Preponderance of Evidence Sufficient.**

46d. *Glascok, Minor, etc., v. Gerold*, Term No. 48. *Held*: In a civil action it is sufficient that there is a preponderance of the evidence and it makes no difference that an act would make the defense liable criminally. Affirmed. (BOGGS, J.)

### **Reversed on the Facts.**

47d. *Pauly v. Madison County*, Term No. 49. Reversed and remanded on a review of the record. (MCBIRDE, J.)

### **Affirmed on the Facts.**

48d. *Converse v. Independent Breweries Co.*, Term No. 50. Affirmed on a review of the record. (BOGGS, J.)

### **Right to Sue for a Penalty—Termination of the Right.**

49d. *Town of Canteen v. Weber*, Term No. 51. *Held*: Where a statute provides that upon the commission of a crime at a certain place, a certain sum of money must be paid to the town, the proceeding to collect such a penalty is an action of debt or assumpsit, and since the town has a right to bring the action as soon as the act was committed it does not lose the right because later on the place where the crime was committed is separated from the town. Reversed and remanded. (HIGBEE, P. J.)

### **Variance Must Be Raised at Trial Court—Assumption of Risk—Master's Acts.**

50d. *Lincoln v. Pryor, Receiver of Wabash R. R. Co.*, Term No. 52. *Held*: (1) The question of variance cannot be raised for the first time on appeal. (2) A servant does not assume the risks of the negligent acts of the master that are unusual or extraordinary and not known to the servant. Affirmed. (MCBRIDE, J.)

**Right to Assume That Railroad Will Perform Its Duty—Right to Cross Road in Any Manner—Application of Ordinance, Regulating Trains, to Single Engines.**

51d. *Christmann, Admr., v. I. C. R. R. Co.*, Term No. 53. *Held*: (1) When traveling upon the streets of cities, one may assume in approaching a railroad crossing that the railroad company will perform the duty imposed upon it by law. (2) Persons crossing tracks may assume that speed ordinance will be obeyed, and that trains will not cross a highway without signals as required by law. (3) A person rightfully on a highway crossing and a railroad track has the right to use said highway in crossing the same in any manner he may see fit. (4) An ordinance regulating the speed of trains applies equally to engines when running alone as when attached to and propelling a train of cars. Affirmed. (Boggs, J.)

**Reversed on the Facts.**

52d. *Epps, etc., v. I. C. R. R. Co.*, Term No. 54. Reversed on a review of the record. (McBRIDE, J.)

**Reversed on the Facts.**

53d. *Village of Carrier Mills v. Pritchard*, Term No. 55. Reversed and remanded on a review of the record. (HIGBEE, P. J.)

**No Recovery of Money Furnished for Gambling.**

54d. *Kearney & Becker v. Webb*, Term No. 56. *Held*: Money furnished to be used in gambling, or for the making of bets, wagers or gaming purposes cannot be recovered by a suit at law as public policy forecloses the one who furnishes the money from using the court to recover it. Reversed and remanded. (McBRIDE, J.)

**Insurance—Merger of Societies—Laws Binding the Assured.**

55d. *Fairchild v. Maccabees*, Term No. 57. *Held*: Where one, in being insured, contracts to be bound by the laws of the society insuring him, then in force or thereafter to be adopted by them, and the society merger with another society and the merged societies are to be controlled by the laws of the society which did not insure the assured, the merger being according to law, the policy will be governed by the new laws. Reversed and remanded. (Boggs, J.)

**Affirmed on the Facts.**

56d. *Soney v. Rothschild*, Term No. 58. Affirmed on a review of the record. (McBRIDE, J.)

**Damages—Measure When Injury to Land Caused by Operation of Railway—Right of Jury to Consider Its View of Premises—Must Consider Both Construction and Operation—Court Should Not Assume That Damage Is Done.**

57d. *Gibbon v. Southern Ill. Ry.*, Term No. 59. *Held*: (1) Where one suffers injury to his property because of the operation of a railway, the true measure of damages is the difference in the market value of the property in question before the operation of the railway and its market value after the operation, without reference to any improvement the owner of the property may have placed on the same after the operation of the road. (2) It is error to instruct the jury that they may consider the evidence and their view of the premises in making up their verdict, in an ordinary law action. (3) It is error to instruct the jury that they should consider the effect of the construction of a railway in fixing damages, but the instruction must tell the

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jury to also consider the effect of the operation of the railroad. (4) In an instruction the court should not assume that damage is done. Reversed and remanded. (Boggs, J.)

### Reversed on the Facts.

58d. *Burt & Swift, etc., v. Ill. Southern Ry. Co.*, Term No. 63. Reversed and remanded on a review of the record. (HIGBEE, P. J.)

### Practice—Filing of a Cross Bill.

59d. *Nietert et al. v. Blank et al.*, Term No. 64. *Held*: It is only where complete justice cannot be done on the original bill and answer that a cross-bill is proper. Affirmed. (HIGBEE, P. J.)

### Affirmed on the Facts.

60d. *Duncan, Admr., etc., v. Centralia Coal Co.*, Term No. 65. Affirmed on a review of the record. (McBRIDE, J.)

### Reversed on the Facts.

61d. *Weger v. Western Supply & Wrecking Co.*, Term No. 68. Reversed on a review of the record. (HIGBEE, P. J.)

### Pleading—Traverse of Matters in the Inducement.

62d. *Johnson v. Hull*, Term No. 71. *Held*: Recitals in the inducement in a declaration are not traversed by a plea of the general issue, and in order to put those matters in issue there would have to be a special plea. Affirmed. (McBRIDE, J.)

### Affirmed on the Facts.

63d. *Williams v. Moehlman*, Term No. 72. Affirmed on a review of the record. (HIGBEE, P. J.)

### Statute of Limitations—Payments Made on Note—Liability of Each of Joint Debtors.

64d. *Hippard et al. v. Rebham, Admr., etc.*, Term No. 73. *Held*: (1) Where a payment has been made upon a note by the maker thereof, or by his authority, the statute of limitations will not run against the mortgage securing the note until the lapse of ten years after such payment. (2) A mortgage given to secure the payment of a joint and several note will operate to continue a lien on the mortgaged premises so long as payments of the note may be enforced against either joint debtor. Affirmed. (McBRIDE, J.)

### Evidence—Competency of Mortgagor—Decree Will Not Be Reversed Where There Is Sufficient Competent Evidence—Negotiable Instruments—Must Be Payable Unconditionally.

65d. *Barton v. Hayden, Admr., et al.*, Term No. 74. *Held*: (1) Where one gives a note secured by the mortgage and the mortgagee assigns the note and mortgage, the mortgagor is not a competent witness against the assignee's administrator to prove there was no consideration for the mortgage. (2) In chancery where the competent evidence is sufficient to uphold the decree, the same will not be reversed on account of the admission of incompetent evidence, as the presumption is that the chancellor did not consider the evidence which was incompetent. (3) An instrument must be payable unconditionally in order to be negotiable. Affirmed in part, reversed in part and remanded. (HIGBEE, P. J.)

**Roads and Bridges Act of 1913—Right to Have a Special Vote as to Whether the One Commissioner System Should Continue.**

66d. *People ex rel, Marteeny et al., etc., v. Henn*, Term No. 75. *Held*: By Article 9 of "An Act to Revise the Law in Relation to Roads and Bridges" a town has the right upon petition to have a special election to vote on the question of whether or not the town should go back to the old system of three commissioners, at any time the voters see fit to do so. *Affirmed.* (McBRIDE, J.)

**Improper Questions to Jury After Objection Thereto Sustained—Recovery on Penal Ordinance.**

67d. *Village of Ramsey v. Hayes et al., etc.*, Term No. 76. *Held*: (1) In order to raise the question on appeal of one having insisted in propounding improper questions to the jurors in their examination after the object had been sustained to the questions by the trial court, the other must raise the question on the motion for a new trial. (2) Recovery can be had for only one violation of a penal ordinance in a single count. *Affirmed.* (BOGGS, J.)

**Reversed on the Facts.**

68d. *Diddea, Executrix, v. Page*, Term No. 77. *Reversed and remanded on a review of the record.* (HIGBEE, P. J.)

**Insanity—Jurisdiction of Court—Impeachment of Record by Parol—Removal of Conservator—Fitness to Have Care of Property.**

69d. *Moats v. Moore, Conservator, etc.*, Term No. 78. *Held*: (1) A county court is one of general jurisdiction, and though a decree declaring one insane contains no recital of notice since it is a court of general jurisdiction, and since it rendered the decree the presumption is that it had jurisdiction both as to the subject matter and the parties to do so. (2) A record in this class of cases (insanity) imports verity and cannot be impeached by parol testimony. (3) The statute with reference to the discharging of an insane person by habeas corpus does not require the removal of the conservator. (4) It is a question for the jury whether the petitioner for the removal of the conservator is a fit person to have the care of his property. *Affirmed.* (McBRIDE, J.)

**Reversed on the Facts.**

70d. *Stein, Admr., v. C. & E. I. R. R. Co.*, Term No. 79. *Reversed and remanded on a review of the record.* (HIGBEE, P. J.)

OPINION FILED MAY 4, 1916.

**Effect of Reversal of a Decree Without Mention as to a Cross Bill.**

71d. *Thomas & Ruddick v. Dodge, Fox et al.*, Term No. 26. Where the Circuit Court renders a decree and on hearing in the Supreme Court the decree is reversed and remanded, but nothing is said as to the status of a cross-bill which had been dismissed by the Circuit Court on the hearing before it, the relief having been granted on the original bill, the entire decree will be held to have been reversed. *Affirmed.* (BOGGS, J.)

# ILLINOIS APPELLATE COURT CASES MONTHLY DIGEST

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## IN THE FIRST DISTRICT

Opinions digested by Student Editors, Turnbull, Breyer, Carson, Marshall, Price, Segal, Coon, Golding and Sherwood.

OPINIONS FILED MARCH 27, 1916.

**Affirmed on the Facts.**

189a. *People v. Leon*, Gen. No. 21743. Affirmed on a review of the record. (HOLDOM, J.)

**Evidence—Law and Fact.**

190a. *Weary v. Winton Motor Car Co.*, Gen. No. 21746. *Held*: (1) In an action for injury to an automobile in a collision, evidence that just prior to the collision in question the plaintiff's car had been in another collision and had not been repaired after the first collision, is admissible on the question of damages. (2) The question of plaintiff's being in the exercise of due care and caution is one of fact, and not of law. Reversed and remanded. (HOLDOM, J.)

**Practice—Matter Heard on Appeal—Form of Verdict—Motion to Amend.**

191a. *Meachan v. Loddell*, Gen. No. 21811. *Held*: (1) Under rules of the Municipal Court, a defendant will be heard only on appeal as to those matters of defense specifically set out in his affidavit. (2) It is not necessary for a jury to reduce its verdict to writing; it may be reduced to proper form by the clerk under the direction of the court. (3) It is not error for the court to deny leave to a defendant to amend his affidavit of defense when the motion is made after the conclusion of the trial. Affirmed. (McSURELY, P. J.)

**Affirmed on the Facts.**

192a. *People v. DeJoy*, Gen. No. 21814. Affirmed on a review of the record. (McSURELY, P. J.)

**Practice—Return of Files—Bill of Exceptions.**

193a. *Swarts v. Brinks Chicago City Express Company*, Gen. No. 21866. *Held*: (1) The proper despatch of the business of the court will not permit of its awaiting the convenience of counsel in returning files retained in their offices and without which a motion made by such counsel cannot be decided. (2) In order to authorize other than the trial judge to sign the bill of exceptions, the trial judge must have been unable to sign the bill of exceptions by reason of death, sickness or other disability of a physical or mental nature which prevented him from performing his duties or functions. (3) When the record shows the bill of exceptions was not actually signed within the time granted for filing it, it must be stricken from the files. Affirmed. (HOLDOM, J.)

**Bastardy—When Objection to Testimony that Relatrix Was Unmarried Must be Taken—Presumption—Objection to Jurisdiction.**

194a. *People v. Lanford*, Gen. No. 21920. *Held*: (1) In a prosecution for bastardy, when the relatrix testifies that she was unmarried and no challenge is made of this fact or motion for finding in the defendant's favor on any such grounds in the trial court, the contention that she was not unmarried is unavailing on appeal. (2) In the absence of proof or challenge to the contrary, it will be assumed that the relatrix in a bastardy prosecution was unmarried at the time of conception. (3) When a defendant is arrested and appears and pleads without making any objection to the court's jurisdiction, it is too late to urge this objection on appeal if it were otherwise well taken. Affirmed. (HOLDOM, J.)



## APPELLATE COURT DIGEST

### Contracts—Default.

195a. *Frankel v. Salsenstein*, Gen. No. 21946. *Held*: Where there has been no wrongful discharge and no refusal by the plaintiffs to go on with a contract of employment, they are not in default and consequently are not barred from seeking to enforce the terms of the contract against the defendant. Affirmed. (McSURELY, P. J.)

OPINIONS FILED MARCH 28, 1916.

### Agency—Acts Implying Authority.

196a. *Babcock, et al. v. Regelin, et al.*, Gen. No. 20890. *Held*: Whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, his authority to such other so to act for him will be presumed to have been given so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority. Affirmed. (McGOORTHY, J.)

### Affirmed on the Facts.

197a. *Doose v. Doose*, Gen. No. 21219. Affirmed upon a review of the record. (GRIDLEY, J.)

### Bills and Notes—Laches in Presentment for Payment.

198a. *Kraetsch v. City of Chicago*, Gen. No. 21255. *Held*: The acceptance of a check of a third party implies an undertaking of due diligence in presenting the check for payment, and in case of loss through want of due diligence, such acceptance will be held to operate as payment. Reversed and judgment here. (GRIDLEY, P. J.)

### Affirmed on the Facts.

199a. *McCarthy & Lordie v. Chicago & N. W. Ry. Co.*, Gen. No. 21264. Affirmed on a review of the record. (GRIDLEY, P. J.)

### Affirmed on the Facts.

200a. *People v. Snowden*, Gen. No. 21285. Affirmed on a review of the record. (GRIDLEY, P. J.)

### Divorce—Jurisdiction to Make Partition and Appoint a Receiver—Time for Objection on Ground of Multifariousness.

201a. *Eller v. Eller*, Gen. No. 21308. *Held*: (1) The court in divorce proceedings has jurisdiction to make a partition and appoint a receiver to collect rents. (2) The question of multifariousness cannot be raised for the first time on appeal. Affirmed. (BARNES, J.)

### Affirmed on the Facts.

202a. *Dyke v. Petty and McFeely*, Gen. No. 21319. Affirmed on a review of the record. (BARNES, J.)

### Affirmed on Remittitur on Facts.

203a. *Hertel v. Chicago City Railway Co.*, Gen. No. 21335. Affirmed on remittitur on a review of the record. (BARNES, J.)

### Affirmed on the Facts.

204a. *Calabrese v. Cermak*, Gen. No. 21341. Affirmed on a review of the record. (BARNES, J.)

### Reversed on the Facts.

205a. *In re Estate of Freilich, Freilich v. Freilich and Schonfeld*, Gen. No. 21352. Reversed and remanded on a review of the record. (BARNES, J.)

**Practice—Want of Declaration in First-class Case Under Municipal Court Act—Presumption of Regularity of Procedure.**

206a. *The New Columbus Buggy Co. v. Empire Express Storage and Van Co.*, Gen. No. 21365. *Held*: Unless it is shown to the contrary, it will be presumed that party was authorized to prosecute a first-class suit without a declaration, within the Municipal Court Act, Sec. 28, par. 9. Affirmed. (BARNES, J.)

**Reversed on the Facts.**

207a. *White Brass Castings Co. v. Automatic Recording Safe Co.*, Gen. No. 21375. Reversed on a review of the record. (BARNES, J.)

**Evidence—Failure to Present Newly Discovered Evidence During the Trial.**

208a. *People of the State of Illinois, ex rel. v. Wolf*, Gen. No. 21449. *Held*: It is not error to overrule a motion for a new trial on the ground of newly-discovered evidence when such evidence was known to the defendant before the trial and no explanation was given by him to explain his failure to offer such evidence during the trial. Affirmed. (McGOORRY, J.)

**Pleading—What Constitutes Duplicity.**

209a. *People v. Speedy*, Gen. No. 21498. *Held*: (1) Where there is but one offense which may be committed in different ways, they may in most instances, where not clearly repugnant, be charged in one count, and proof of the offense in any one of the ways will sustain the allegation. (2) Where there is nothing on the face of the information to indicate that the several acts were committed at different times or were distinct and separate offenses, the information is not bad for duplicity. Reversed and remanded. (BARNES, J.)

**Reversed on the Facts.**

210a. *People ex rel. Jorcsik v. Garines*, Gen. No. 21596. Reversed and remanded upon a review of the record. (McGOORRY, J.)

**Reversed on the Facts.**

211a. *People of the State of Ill. v. Lyons*, Gen. No. 21624. Reversed and remanded on a review of the record. (BARNES, J.)

**Bastardy Statute Affecting Non-Resident Guardian Ad Litem.**

212a. *People of the State ex rel. Schultz v. Wunsch*, Gen. No. 21781. *Held*: (1) Where the person accused is found in the City of Chicago, he is amenable to the bastardy statute even though he is a non-resident. (2) A guardian *ad litem* need not be appointed by the court for the defendant in bastardy cases under the statute because the nature of the proceedings is criminal. Affirmed. (McGOORRY, J.)

OPINIONS FILED APRIL 10, 1916.

**Real Property—Demise of a House by Street Number Carrying with It a Barn on the Same Premises.**

213a. *Norton v. Deer*, Gen. No. 20771. *Held*: Where premises are demised by the description of the street number of a house thereon, other circumstances may show the intention of the parties to include in the demise other buildings on the same lot. Reversed. (McSURELY, P. J.)

**Pleading—Necessity in Mandamus Proceedings of Alleging the Municipal Ordinance Creating the Office in Question—Judicial Notice of**

**Municipal Ordinances.**

214a. *Rudnick, Admr. v. City of Chicago, et al.*, Gen. No. 20897. *Held*: (1) In mandamus proceedings where the existence of an office is claimed, it

must be made to appear by appropriate averments that the office was created in the manner prescribed in cases of this character by an ordinance of the city. (2) Courts of general jurisdiction do not take judicial notice of municipal ordinances, but he who relies upon such an ordinance must allege and prove it as a matter of fact. Reversed. (HOLDOM, J.)

**Probate of Will—Effect of Cross-bill Contesting Validity of Will, When the Original Bill is Dismissed for Want of Jurisdiction.**

215a. *Harney v. Wilson, et al., Wilson v. Behen, et al.*, Gen. No. 21029. *Held*: (1) The right to contest a will is statutory, and unless the complainant complies strictly with the statute in regard to the time of filing his bill, the court has no jurisdiction. (2) When an original bill in chancery is dismissed for want of jurisdiction a cross-bill in the same cause is likewise dismissed, and stands as if it had never been filed at all. Affirmed. (HOLDOM, J.)

**Husband and Wife—On What Contracts They May Sue Each Other.**

216a. *Hendrickson v. Hendrickson*, Gen. No. 21455. *Held*: Under statute entitled "Husband and Wife," chapter 68, Sections 1 and 8 (Hurd's Illinois Statutes) a husband or wife may sue the other on all contracts except for services rendered to each other. Affirmed. (MCSURELY, P. J.)

**Contract—Money Loaned to Pay a Gambling Debt.**

217a. *Finkel v. Springer*, Gen. No. 21527. *Held*: A person who at the close of a gambling transaction loans money to enable another to pay gambling debt at which the lender was not a party, may recover the money in an action at law, notwithstanding the lender may have knowledge of the purpose for which the money is borrowed and that it is to be disbursed in the payment of gambling debts. Affirmed. (HOLDOM, J.)

**Real Estate—Rents Collectable by Heirs on Death of Owner.**

218a. *McDermott, et al. v. Hoops*, Gen. No. 21552. *Held*: When the owner of real property dies the heirs are entitled to collect the rent, and not the administrator. Affirmed. (MCSURELY, P. J.)

**Contract—A Contract to Continue "Until the Winter is Over," is Definite as to Time; Judicial Notice of the Seasons of the Year; When an Employee May Be Discharged Under an Employment Contract.**

219a. *Saarela v. Hoglund*, Gen. No. 21558. *Held*: (1) An agreement for employment to continue "until the winter is over" is definite as to time. (2) The court will take judicial notice of the period and extent of the seasons of the year. (3) Under a contract of employment it is a breach of contract to discharge the employee when he has satisfactorily rendered the services contracted for, although the employee refuse to work in excess of that which he has contracted to do, when the employer demands the excess. Affirmed. (HOLDOM, J.)

**Survival of Proceeding to Assess Damages upon Dissolution of an Injunction—Appearance of Counsel, a Representation that their Clients are in Life—Practice—Parties to a Writ of Error.**

220a. *Gindell v. Conlon*, Gen. No. 21566. *Held*: (1) A proceeding to assess damages upon the dissolution of an injunction does not survive either in favor of the representatives of the parties moving for the assessment or against the executors of the parties against whom the assessment is sought either by statute or at common law. (2) Counsel cannot be heard on review in contradiction to the representation that their clients were still in life which they make by their appearance in the trial which eventuates in the decree complained of. (3) Parties to a Writ of Error must be the same as the parties to the decree in the trial court. Affirmed. (HOLDOM, J.)

**Affirmed on the Facts.**

221a. *Klaus, et al. v. Flick Construction Co.*, Gen. No. 21572. Affirmed on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

222a. *Holmes v. Scott*, Gen. No. 21633. Affirmed on a review of the record. (HOLDOM, J.)

**Contracts—Alterations.**

223a. *Ormak v. Starck Piano Co.*, Gen. No. 21676. *Held*: Material alterations of a contract made without authority of the other contracting party and not subsequently ratified, either expressly or by implication operates as a release of the other contracting party from all obligation under the contract. Affirmed. (HOLDOM, J.)

**Insurance—Provision Limiting the Amount of Insurance Collectible according to the Age of the Insured.**

224a. *Kleinschrodt v. John Hancock Mutual Life Ins. Co.*, Gen. No. 21700. *Held*: A provision in an insurance policy on the life of a child limiting the amount collectible under it, when there are other policies upon the same life so that the total sum collected will not exceed a certain amount, proportioned to the age of the child is valid and enforceable. Reversed and *nil capiat* entered. (McSURELY, P. J.)

**Municipal Court Act Construed—Proof of Conspiracy.**

225a. *Marcus v. Ratsky*, Gen. No. 21714. *Held*: (1) Without making it appear that the person whose testimony is offered was a party to the cause or beneficially interested in its outcome, the evidence cannot be availed of under Sec. 33 of The Municipal Court Act. (2) Before evidence of a conspiracy against a party is admissible, such party must first have been proven to be a co-conspirator with the person whose statements, out of the presence of such party, is proposed to be given in evidence. Affirmed. (HOLDOM, J.)

**Contracts—Interpretation of Promise to Perform Services Satisfactory to the Employer.**

226a. *Hoff v. L. Gould & Co.*, Gen. No. 2789. *Held*: Where a contract provides that services to be performed must be satisfactory to the employer, such clause means that the services should be such that as a reasonable person the employer ought to be satisfied therewith. Reversed. (HOLDOM, J.)

**Mandamus—When it will be Issued—Proof of Existence of Office.**

227a. *People v. City of Chicago*, Gen. No. 21795. *Held*: (1) A Writ of Mandamus will not issue unless the party applying for it shows a right which is clear and undeniable. (2) The fact that the civil service commission establishes a classification of offices and places of employment does not establish the office itself. Reversed. (McSURELY, P. J.)

**Practice—Conclusiveness of a Special Finding.**

228a. *Ozeck v. International Harvester Co.*, Gen. No. 21822. *Held*: When no motion is made to set aside a special finding and there is no assignment of error in that regard, under such circumstances the finding is conclusively binding on the parties. Affirmed. (McSURELY, P. J.)

**Contracts—Interpretation—Obligation of a Surety.**

229a. *Aurora, Elgin & Chicago Railroad Co. v. National Surety Co.*, Gen. No. 21841. *Held*: (1) Parties make their own contracts and courts have no power to impose conditions not made by the parties themselves. (2) The obligation of a surety must be strictly construed and he cannot

## APPELLATE COURT DIGEST

be held under the terms of his undertaking by implication or construction. Affirmed. (HOLDOM, J.)

### Affirmed on the Facts.

230a. *Kane v. Indiana Harbor Belt Railroad Co.*, Gen. No. 21869. Affirmed on a review of the record. (McSURRELY, P. J.)

### Equity Pleading—Answer—Waiver of Points—Evidence of Negotiations Leading up to Making Contract—When Admissible—Payment of Earnest Money—When Returnable—Meaning of Tender in Case of Concurrent and Mutual Promises.

231a. *Summers v. Hedenberg*, Gen. No. 22011. *Held*: (1) The rule in chancery is that a defendant is bound to apprise the complainant by his answer of the nature of the defense he intends to set up, and the defendant cannot avail himself of any matter of defense which is not stated in his answer even though it should appear in the evidence. (2) A point which is not raised before the master by objection or exception to his report is considered as waived. (3) Where the contract is plain and unambiguous, evidence as to negotiations leading up to it is inadmissible. (4) It makes no difference whether the earnest money was delivered to the seller or by agreement is held by a third party. In case of defects in title which are not cured, at the purchaser's option, the contract becomes void and the earnest money shall be returned, but if the purchaser fails to perform, then at the seller's option the earnest money may be retained by him as liquidated damages. (5) Tender in the case of mutual and concurrent promises does not mean the same kind of an offer as when used in reference to the payment of a debt due in money, but only means a readiness and willingness accompanied with ability on the part of the parties. Affirmed. (BAKER, J.)

### Affirmed on the Facts.

232a. *Schuman v. Chicago Railways Co.*, Gen. No. 21652. Affirmed on a review of the record. (McSURRELY, P. J.)

### Affirmed on the Facts.

233a. *Chicago Steel Foundry Co. v. Andresen-Evans Co.*, Gen. No. 21734. Affirmed on a review of the record. (BAKER, J.)

## OPINIONS FILED MAY 1, 1916.

### Reversed on Facts and Judgement Here.

234a. *Uroblewski v. City of Chicago*, Gen. No. 21771. Reversed on review of the record, and judgment here. (McSURRELY, P. J.)

### Reversed on Facts, with Judgment of Nil Capiat.

235a. *Rudnic, Admr., v. City of Chicago*. Gen. No. 21985. Reversed on review of the record, with judgment of *nil capiat*. (BAKER, J.)

## OPINIONS FILED MAY 12, 1916.

### Chancery Proceedings—Findings of Master.

236a. *Barrows v. Connelly*. Gen. No. 20571. *Held*: (1) Where a cause has been referred to a master to take and report the evidence and his conclusions, it is not competent that other evidence be considered. (2) Where matters of fact are referred to a master for his determination, it is the duty of the parties, when notified, to appear before him and there contest the matter, and if his findings are not, in their judgment, supported by the evidence, it is their duty to interpose their objections, so as to afford the master an opportunity to modify his report if it should happen to be wrong, and if in such cases after hearing the objections, the master declines to

modify or change his report, it is the duty of the objecting parties, after it has been filed in court, to appear there and file exceptions to it; and where this course has not been pursued, and no sufficient reason is assigned for not doing so, the report of the master, when approved by the court, will be deemed in this court conclusive upon the questions covered by it. Affirmed. (O'CONNOR, J.)

**Rehearing Denied on the Facts.**

237a. *Thompson Co. v. Burns*, Gen. No. 20763. Rehearing denied on a review of the record. (GOODWIN, J.)

**Criminal Cases—Weight of Evidence—Jurisdiction of Appellate Court.**

238a. *People v. Stine*, Gen. No. 21048. *Held*: It is not within the province of this court to set aside a verdict in a criminal case unless the evidence clearly gives rise to a well founded doubt in regard to the guilt of the accused. Affirmed. (GOODWIN, J.)

**Reversed on the Facts.**

239a. *Hulbert v. Richter*, Gen. No. 21067. Reversed and remanded on a review of the record. (GOODWIN, J.)

**Landlord and Tenant—Forcible Detainer—Demand and Refusal.**

240a. *Metropolitan West Side Elevated Co. v. Govostis*, Gen. No. 21087. *Held*: A demand for possession before bringing an action of forcible detainer, against a tenant holding over, is not necessary. Affirmed. (O'CONNOR, J.)

**Torts—Violation of Ordinance.**

241a. *Behrle v. Hust*, Gen. No. 21064. *Held*: That damages resulting from failure to comply with the terms of a municipal ordinance give rise to an action, is well settled. Affirmed. (GOODWIN, J.)

**Evidence—Husband and Wife—Parties in Interest.**

242a. *Skahen v. Strauss*, Gen. No. 21097. *Held*: The wife may testify in all cases in which her husband is a party, where, if unmarried, she would be either plaintiff or defendant; and furthermore, in cases where the litigation concerns the wife's separate property, also in all matters of business transactions wherein the wife acted as agent of her husband. Reversed and remanded. (PAM, P. J.)

**Reversed on the Facts.**

243a. *Fox v. C. & N. W. Ry. Co.*, Gen. No. 21101. Judgment reversed and judgment here, on review of the record. (O'CONNOR, J.)

**Affirmed on the Facts.**

244a. *Lewis v. C. & N. W. Ry. Co.*, Gen. No. 21102. Affirmed on a review of the record. (GOODWIN, J.)

**Torts—Assault and Battery—Instructions—Damages.**

245a. *Michalak v. Umkiewics*, Gen. No. 21103. *Held*: Although the damages in such cases are very much a matter of sentiment and feeling, and no rule can be prescribed by which they shall be measured, still, the judgment of the jury must be exercised in every case, and all the circumstances duly weighed by them. Affirmed on remittitur, otherwise reversed and remanded. (PAM, P. J.)

**Reversed on the Facts.**

246a. *Forte v. Cohen*, Gen. No. 21110. Reversed and remanded on a review of the record. (O'CONNOR, J.)

## APPELLATE COURT DIGEST

### Contracts—Evidence of Actual Worth of Labor and Materials.

247a. *Graczykowski v. Wysocki*, Gen. No. 21113. *Held*: Where a plaintiff's claim is predicated upon a special contract, the amount of the judgment can not be affected by evidence in regard to what the labor and materials were reasonably worth. Affirmed. (GOODWIN, J.)

### Agency—Acts Not Binding on Principal—Failure of Party to Suit to Appear.

248a. *Nudelman v. Haffenberg*, Gen. No. 21120. *Held*: (1) If a person undertakes to contract as an agent for an individual or corporation, and contracts in a manner which is not legally binding on his principal, he is personally responsible; and the agent, when sued upon such contract, can exonerate himself from personal liability, only by showing his authority to bind those for whom he has undertaken to act. (2) Where a party to a suit fails to be present on the trial thereof, and a judgment is entered against him, before the court will set aside the same, the defendant must show, first, that he has not been negligent, and second, that he has a meritorious defense. Affirmed. (O'CONNOR, J.)

### Common Carriers—Negligence—Stipulations by Carrier as to Time of Giving Notice of Loss.

249a. *Mays v. Wells, Fargo & Co.*, Gen. No. 21142. *Held*: A common carrier is always responsible for his negligence, no matter what his stipulations may be, but an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence, it is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required. Affirmed. (GOODWIN, J.)

### Affirmed on the Facts.

250a. *Libman v. Brats*, Gen. No. 21144. Affirmed on a review of the record. (PAM, P. J.)

### Sales—Breach of Warranty—Foreign Corporations.

251a. *Anderson Computing Scale Co., v. Hattenbach*, Gen. No. 21152. *Held*: (1) Where there is a sale and delivery of personal property, with an express or an implied warranty, if the property is found to be defective, the purchaser may keep and use the property and sue for damages on a breach of warranty, or when sued for the price, he may recoup such damages. (2) Where there is a warranty of goods sold, without fraud, and the goods have been accepted and there is no stipulation in the contract that they may be returned, the vendee has no right to annul the contract without the consent of the vendor, for a breach of warranty. But when he is sued for the purchase price, he may recoup the damages sustained by reason of the breach of warranty. (3) The soliciting of orders in this state by the agents of a corporation of another state, does not constitute doing business as contemplated by the statute. Affirmed. (O'CONNOR, J.)

### Disorderly Houses—Power of Equity to Enjoin Maintenance of Such Houses.

252a. *People v. Buconich*, Gen. No. 21159. *Held*: (1) Where a nuisance affects the public welfare, it may be abated in equity upon application of the proper officer, and a house of ill-fame may be or may become a nuisance of that character. (2) The fact that a nuisance may be a crime under the statute, and punishable as such, does not prevent a court of equity from enjoining the continuance of such nuisance. Affirmed. (PAM, P. J.)

**Common Carriers—Bills of Lading.**

253a. *Cochrane v. Chicago, Great Western R. R. Co.*, Gen. No. 21160. *Held*: A defendant carrier cannot relieve itself from liability by failure to issue a receipt or bill of lading, where the plaintiff relies on an oral contract. Reversed and remanded. (O'CONNOR, J.)

**Chattel Mortgages—Acknowledgment by Power of Attorney as Against Third Persons—Application of Rule in Case of Corporations.**

254a. *Cermak, bailiff, v. Royal Furniture Co.*, Gen. No. 21228. *Held*: A chattel mortgage acknowledged by an attorney in fact under a power of attorney is invalid as against third persons, because the statute does not contain any provision authorizing acknowledgments to be made under a power of attorney. The rule applies as well to corporations as to individuals. Affirmed. (PAM, P. J.)

**Affirmed on the Facts.**

255a. *Ashley v. Masterson*, Gen. No. 21268. Affirmed on a review of the record. (HOLDOM, J.)

**Contracts of Sale—Right of Vendor When Vendee Refuses Goods.**

256a. *The Harmony Co. v. The Sanitary Drinking Cup Co.*, Gen. No. 21269. *Held*: The vendor, in cases where vendee refuses to take goods purchased, has three remedies: First, to store the goods for the vendee, give notice that he has done so, and recover the contract price; second, to keep the goods and recover the difference between the contract price and the market price of the goods; and third, to sell the goods to the best advantage and recover the loss if the goods fail to bring the contract price. Affirmed. (PAM, P. J.)

**Affirmed on the Facts.**

257a. *Quinn v. City of Chicago*, Gen. No. 21301. Affirmed on a review of the record. (PAM, P. J.)

**Affirmed on the Facts.**

258a. *People v. Wolf*, Gen. No. 21819. Affirmed on a review of the record. (GOODWIN, J.)

**Rehearing Denied on the Facts.**

259a. *Childs & Co. v. City of Chicago*, Gen. No. 22381. Rehearing denied on a review of the record. (O'CONNOR, J.)

OPINIONS FILED MAY 23, 1916.

**Affirmed on the Facts.**

260a. *Peter Hand Brewing Co. v. Schmits & Schmits*, Gen. No. 22013. Affirmed on a review of the record. (BARNES, J.)

**Affirmed on the Facts.**

261a. *Peter Hand Brewing Co. v. Schmits*, Gen. No. 22014. Affirmed on a review of the record. (BARNES, J.)

OPINIONS FILED MAY 29, 1916.

**Municipal Corporations—Mandamus—Laches.**

262a. *People ex rel. Murphy v. City of Chicago*, Gen. No. 21569. *Held*: It is manifestly unfair where there is no disagreement as to the propriety or legality of a discharge, that a relator should lie still, and allow another person to occupy the position from which he has been removed, and draw pay for his services therein, and then, after a long space of time has elapsed that he should be allowed to have remedy by mandamus to be reinstated in office, and recover compensation for services therein, which he has not per-



## APPELLATE COURT DIGEST

formed, and which he has for a long time, without objection, permitted another person to perform and be paid for. Reversed and remanded with directions. (BAKER, J.)

### Pleading—Bill of Exceptions.

263a. *Malecki v. Heldman*, Gen. No. 21602. *Held*: If a bill of exceptions does not show that the motion for a new trial was made and overruled and an exception taken, the court will not investigate whether the evidence sustains the verdict. (BAKER, J.)

### Dramshops—Power of Officer Authorized to Issue Licenses.

264a. *People ex. rel. Lynch v. Thompson, mayor*, Gen. No. 21767. *Held*: The officer authorized to issue dram shop licenses is entrusted by the statute with discretion in the issuance of such licenses. Where there is in the record no evidence tending to show that the officer failed to issue the license through fraud or an arbitrary exercise of his discretion, the officer is entrusted with the discretion to determine whether the proposed location of a saloon is in a suitable place, and the court cannot interfere with the exercise of such discretion. Reversed and remanded. (BAKER, J.)

### Common Carriers—Limitation of Liability—Fraud in Giving Valuation by Consignor.

265a. *Pacific Express Co. v. Spaulding & Co.*, Gen. No. 21917. *Held*: Mere acquiescence by a consignor in the terms of limitation of liability in the receipt cannot be held to be such a misrepresentation as to value as to amount to fraud and deceit. Reversed. (McSURELY, P. J.)

### Affirmed on the Facts.

266a. *Babcock, Admr. v. Farwell, Extr.*, Gen. No. 21956. Affirmed on a review of the record. (HOLDOM, J.)

### Torts—Personal Injuries—Exercise of Due Care—Questions for Jury.

267a. *Wilson, Admr. v. Chicago City Ry. Co.*, Gen. No. 22035. *Held*: A traveler approaching a railroad crossing is required to use such care as a person of ordinary prudence would exercise under such circumstances, and this ordinarily demands the use of the faculties of sight and hearing to discover whether a train is approaching or not, but it cannot be said as a matter of law that the failure to look or listen under all circumstances will bar recovery. It is usually a question of fact for the jury to determine in view of all the surrounding circumstances, what constitutes negligence or want of due care. Affirmed. (BAKER, J.)

### Torts—Injury to Property—Declaration—Averment of Due Care—Fourth Class Cases.

268a. *Fortune Bros. Brewing Co. v. Chicago City Ry. Co.*, Gen. No. 22045. *Held*: (1) A declaration in an action to recover for injuries received through negligence, which does not aver due care on the part of the plaintiff when he was injured, and does not contain any averment as to his conduct or the circumstances surrounding him from which due care, on his part may be reasonably inferred, does not state a cause of action, and, after the period of limitation fixed by the statute has elapsed, cannot be amended to state a cause of action not subject to the bar of the statute. If a declaration omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. (2) A statement of claim in tort in a fourth class case, which is wholly silent as to the care of the plaintiff and gives no facts whatever touching his conduct or position in relation to the accident, does not state a cause of action. Affirmed. (McSURELY, P. J.)

**Pleading—Aider by Verdict.**

269a. *McConnell v. Chicago Rys. Co. and Hinchliffe*, Gen. No. 22056. *Held*: (1) Where both parties to a suit submit instructions declaring the rules of law applicable to the facts proven and request the jury to return their verdict in accordance with those rules of law as applied to the facts proven, neither party can be heard to complain that such facts were not within the scope of the allegations of the pleadings under which those facts were permitted to be proven. (2) A defect which would be fatal on demurrer is cured by verdict where the issue joined is such as necessarily requires proof of the facts imperfectly stated, or even wholly omitted, and without which proof, it is not to be presumed the judge would have directed or the jury have returned the verdict. *Affirmed.* (BAKER, J.)

**Affirmed on the Facts.**

270a. *People ex. rel. Zebert v. Libin*, Gen. No. 22068. *Affirmed* on a review of the record. (BAKER, J.)

**Common Carriers—Liability of Initial Carrier for Negligence of Connecting Carriers.**

271a. *Pennington v. Grand Trunk Western Ry. Co.*, Gen. No. 22061. *Held*: Under the Carmack Amendment to the Interstate Commerce Act, the remedy of a shipper for loss or damage to property delivered to an initial carrier, which issues its through bill of lading to the shipper for interstate transportation over several lines, and which property is delayed while in the hands of a connecting carrier, is against the initial carrier alone, and not against the connecting carrier. *Reversed.* (McSURELY, P. J.)

**Divorce—Allegation by Husband as to Extreme Cruelty on Part of Wife.**

272a. *Von Degens v. Von Degens*, Gen. No. 22074. *Held*: Where the husband asks for a divorce from his wife upon the ground of extreme and repeated cruelty, he must make out a clear case; and it is not sufficient for him to show slight acts of violence on her part toward him, so long as there is no reason to suppose that he cannot protect himself by a proper exercise of his marital powers. *Affirmed.* (McSURELY, P. J.)

**Landlord and Tenant—Pleading—Failure of Abstract to Set Out Lease.**

273a. *Williams v. Wigley*, Gen. No. 22097. *Held*: An abstract must be full and complete and in accordance with the rules of the court. The court will not explore the record to find errors to sustain the assignments of error. *Affirmed.* (BAKER, J.)

**Affirmed on the Facts.**

274a. *Nyso v. Cech*, Gen. No. 22100. *Affirmed* on a review of the record. (BAKER, J.)

**Contracts—Parol Evidence.**

275a. *Merrick v. Rooney*, Gen. No. 22210. *Held*: The recital of a given consideration in a written contract may be contradicted by parol evidence for all purposes except to destroy the legal effect of the instrument. *Affirmed.* (HOLDOM, J.)

**Reversed on the Facts.**

276a. *De Salvo v. Anderson*, Gen. No. 22237. *Reversed* on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

277a. *Maslo v. Matyasik*, Gen. No. 22279. *Affirmed* on a review of the record. (McSURELY, P. J.)

## APPELLATE COURT DIGEST

### Municipal Corporations—Taxes.

278a. *People ex. rel. Webster v. City of Chicago*, Gen. No. 22518. *Held*: (1) The primary duty of removing ashes rests upon the individual property owner and not upon the city. (2) A city may levy and collect a general tax on real estate to remove ashes from some premises and is under no obligation to remove them from the rest. *Affirmed.* (HOLDOM, J.)

### Reversed on the Facts.

279a. *Lee v. Birmingham*, Gen. No. 21823. *Reversed and remanded on a review of the record.* (HOLDOM, J.)

### Procedure—Verdict Contrary to Evidence—Damages—Future Profits.

280a. *Barnett v. Caldwell Furniture Co.*, Gen. No. 21884. *Held*: (1) Where there is an irreconcilable conflict in testimony, a court of review will not reverse the judgment of the trial court, where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the judgment. (2) Where it is certain that a plaintiff has suffered damages through a defendant's breach of contract, altho plaintiff's loss is future profits and cannot be ascertained with mathematical accuracy, he must recover damages upon the most reasonable theory compatible with the situation. *Affirmed.* (HOLDOM, J.)

OPINIONS FILED JUNE 1, 1916.

### Affirmed on the Facts.

281a. *Lange v. Stack and Cermak, Bailiff*, Gen. No. 21583. *Affirmed on a review of the record.* (BARNES, J.)

### Contracts—Printed Forms.

282a. *American Terra Cotta & Ceramic Co. v. Bankers' Surety Co.*, Gen. No. 21294. *Held*: Although the written provision of a contract should prevail over one inconsistent with it, and which is part of a printed form adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregard the printed stipulations will the latter give way. *Affirmed.* (McGOORTY, J.)

### Affirmed on the Facts.

283a. *Whitcomb v. Seney*, Gen. No. 21260. *Affirmed on a review of the record.* (BARNES, J.)

### Contracts—Accord and Satisfaction—Protest Against Deductions—Acceptance of Balance.

284a. *Devries v. Elaborated Ready Roofing Co.*, Gen. No. 21555. *Held*: Even though one protests against deductions, his acceptance of the balances according to the statements constitutes an accord and satisfaction. *Reversed.* (BARNES, J.)

### Workmens Compensation Act.

285a. *Hoffman, Admn. v. Knisely Bros.*, Gen. No. 21359. *Held*: An injury received in leaving the premises upon which workman is employed is within the phrase "arising out of and in the course of employment," as the leaving of the premises where one is employed is so closely connected with employment as to render it a necessary incident thereof. (BARNES, J.)

### Affirmed on the Facts.

286a. *Whitsett v. Chicago Washed Coal Co.*, Gen. No. 21299. *Affirmed on a review of the record.* (GRIDLEY, P. J.)

### Affirmed on the Facts.

287a. *Devine, Admn. v. Fish Furniture Co.*, Gen. No. 20947. *Affirmed on a review of the record.* (McGOORTY, J.)

**Reversed on the Facts.**

288a. *Sachs v. Friedman Bros. & Lipsky*, Gen. No. 21331. Reversed on a review of the record. (McGOORRY.)

**Affirmed on the Facts.**

289a. *Wasmuth v. Wright*, Gen. No. 21336. Affirmed on a review of the record. (BARNES, J.)

**Contracts—Evidence of Custom to Vary Specific Agreement.**

290a. *Bushnell v. Brand*, Gen. No. 21012. *Held*: Where an agreement is free from ambiguity, evidence of any custom that would vary or modify its express terms is inadmissible. Reversed and remanded. (McGOORRY, J.)

**Contracts—Set-off—Acceptance of Inferior Goods.**

291a. *Carterville Mining Co. v. Eldridge*, Gen. No. 21468. *Held*: (1) A set-off is a counter claim as to which the defendant is plaintiff, and must establish his right as upon a distinct action; and, therefore, if for a breach of contract, must show he is not himself in default as to the agreement on which he bases his claim. (2) Where a vendee has accepted goods delivered under an express contract, but not at the time or in the quantity required by it, with knowledge of the default of the vendor in those respects, and has himself failed without legal excuse, to pay for them according to it, he can not maintain an action on the contract for such default of the vendor. Reversed and remanded. (BARNES, J.)

**Torts—Personal Injuries—Presumption of Negligence.**

292a. *Heineke v. Chicago Rys. Co.*, Gen. No. 22037. *Held*: A presumption of negligence is said to arise in a case of the "sudden jerk" of a train as being a cause within the control of the carrier. Affirmed. (HOLDOM, J.)

OPINIONS FILED JUNE 6, 1916.

**Affirmed on the Facts.**

293a. *National Bank of the Republic v. Hitermi*, Gen. No. 22103. Affirmed on a review of the record. (McSURELY, P. J.)

OPINIONS FILED JUNE 19, 1916.

**Affirmed on the Facts.**

294a. *Walker v. Chicago, Madison & Northern R. R. Co.*, Gen. No. 20926. Affirmed on a review of the record. (O'CONNOR, J.)

**Torts—Personal Injuries—Verdict of Coroners Jury as Evidence.**

295a. *Novitsky, Admr. v. Knickerbocker Ice Co.*, Gen. No. 21076. *Held*: The admissibility in evidence of the findings of a coroner's jury is now too well established by the authorities to be longer considered an open question in this state. Affirmed. (PAM, P. J.)

**Reversed on the Facts.**

296a. *Peerless Pattern Co. v. Barthen*, Gen. No. 21169. Reversed and remanded on a review of the record. (PAM, P. J.)

**Contracts—Uncertainty of Damages—Set-off.**

297a. *Post & Lester Co. v. Chicago Flexible Shaft Co.*, Gen. No. 21221. *Held*: Where damages sought to be set-off against claim of a plaintiff, are unliquidated, it is incumbent upon the defendant to show that such damages grew out of the transactions for which plaintiff seeks to recover. Affirmed. (O'CONNOR, J.)

## APPELLATE COURT DIGEST

### Corporations—Assessments on Estate of Deceased Stockholder.

298a. *In re. Estate of Dickason, Deceased*, Gen. No. 21231. *Held*: When a corporation no longer transacting business sues the estate of a deceased stockholder for his proportion of the losses incurred by the stockholders as a body, it is necessary to have the amount of losses ascertained and determined; it is also necessary to show the amount due and unpaid, if any, from each stockholder; likewise it should appear what disposition, if any, has been made of the assets of the company. *Affirmed*. (O'CONNOR, J.)

### Fiduciary Relations—Burden of Proof.

299a. *Hobbs v. Monarch Refrigerating Co.*, Gen. No. 21271. *Held*: Transactions between a party and one bearing a fiduciary relation to him are upon his motion prima facie voidable upon grounds of public policy, and the burden of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence, by establishing the fact that the party acted upon competent and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length or he must show that the transaction was had in the most perfect good faith on his part and was equitable and just between the parties. *Affirmed*. (O'CONNOR, J.)

### Reversed on the Facts.

300a. *Polish National Alliance v. Paurvics*, Gen. No. 21288. *Reversed* and remanded with directions on a review of the record. (GOODWIN, J.)

### Evidence—Party Discrediting Testimony of Own Witness.

301a. *Kits v. Scudder Syrup Co.*, Gen. No. 21307. *Held*: While a party may not discredit his own witness by general evidence, he is not precluded from putting in evidence contrary to the testimony of one of his own witnesses even though the incidental effect of such testimony is to impeach or discredit a witness already examined in his behalf. *Reversed* and remanded. (GOODWIN, J.)

### Affirmed on the Facts.

302a. *A Magnus Sons Co. v. Atlantic Brewing Co.*, Gen. No. 21309. *Affirmed* on a review of the record. (PAM, P. J.)

### Pleading—Motion to Strike Plea of Set-off from Files—Plea of Set-off for Unliquidated Damages Not Arising from Contract Sued On.

303a. *Falkenan v. Smedley*, Gen. No. 21313. *Held*: (1) Where a motion to strike defendant's statement of set-off from the files, and the order of court entered thereon, are not contained in the bill of exceptions, the point is not presented for review. (2) Where a defendant's claim for set-off does not arise out of the contract sued on by plaintiff, and where it is not for liquidated damages, it cannot be urged by way of set-off. *Affirmed*. (O'CONNOR, J.)

### Affirmed on the Facts.

304a. *Weinberger v. Marshall Field & Co.*, Gen. No. 21320. *Affirmed* on a review of the record. (GOODWIN, J.)

### Affirmed on the Facts.

305a. *Parker v. Chicago Railways Co.*, Gen. No. 21380. *Affirmed* on a review of the record. (O'CONNOR, J.)

### Procedure—Appeal on an Interlocutory Order.

306a. *Eastman v. Dole*, Gen. No. 22050. *Held*: (1) There must be a final order or decree in a chancery suit, or a final judgment in an action at

law, to justify an appeal or writ of error. (2) A final judgment is one that finally disposes of the rights of the parties, either upon the entire controversy or upon some definite and separate branch thereof. Appeal dismissed. (PAM, P. J.)

**Evidence—Preponderance of Evidence.**

307a. *Grimm, Extr. v. Clark Delivery Car Co.*, Gen. No. 22134. *Held*: A preponderance is not established by the testimony of one witness, directly contradicted by two at least equally creditable witnesses, one of whom was called by the plaintiff itself. Reversed. (McSURELY, P. J.)

**Affirmed on the Facts.**

308a. *McClun v. Furnya*, Gen. No. 22137. Affirmed on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

309a. *Michalsky and Michalsky v. Pisano and Torrio*, Gen. No. 22140. Affirmed on a review of the record. (BAKER, J.)

**Affirmed on the Facts.**

310a. *Trinity Methodist Episcopal Church of Chicago v. Marie Methodist Episcopal Church of Chicago and Wheaton*, Gen. No. 22159. Affirmed on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

311a. *Carpenter v. City of Chicago and Board of Commissioners of Police Pension Fund of Chicago*, Gen. No. 22170. Affirmed on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

312a. *Lauderdale v. Downs*, Gen. No. 22171. Affirmed on a review of the record. (McSURELY, P. J.)

**Contracts—Brokers Commission.**

313a. *Ash v. Oppman*, Gen. No. 22177. *Held*: Where a specific agreement is entered into between a vendor and a broker, whereby the amount and payment of commissions is made dependent upon a condition precedent, the broker has no cause of action and is not entitled to such commissions until the happening of the event stipulated in the agreement covering such payment. Reversed. (BAKER, J.)

**Judgments—Statutory Exemptions.**

314a. *Johnson v. Dellas and Cermak, Bailiff*, Gen. No. 22178. *Held*: An unsworn schedule of property is not a compliance with the statute and is insufficient to exempt property from levy in execution of a judgment. Reversed. (HOLDOM, J.)

**Affirmed on the Facts.**

315a. *Smith v. The Lord & Bushnell Co.*, Gen. No. 22185. Affirmed on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

316a. *City of Chicago v. Zitny*, Gen. No. 22188. Affirmed on a review of the record. (HOLDOM, J.)

**Reversed on the Facts.**

317a. *Zurek v. Ferrecki*, Gen. No. 22191. Reversed without remanding on a review of the record. (HOLDOM, J.)

# ILLINOIS APPELLATE COURT CASES

## MONTHLY DIGEST

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## IN THE FIRST DISTRICT

Opinions Digested by Student Editors, Turnbull, Breyer, Carson, Marshall, Price, Segal, Coon, Golding and Sherwood.

**Contracts—Specific Terms—Evidence as to Understanding Other Than That Expressed in Terms.**

318a. *Hansen v. Best Brewing Co.*, Gen. No. 22209. *Held*: Where there is no fraud or mistake in the preparation of an instrument, and it appears that the parties signing understood its language and purpose, its covenants will be enforced. Evidence that there was another understanding is not in itself convincing. Reversed and remanded with directions. (McSURELY, P. J.)

**Affirmed on the Facts.**

319a. *Dewald v. Becker*, Gen. No. 22211. Affirmed on a review of the record. (BAKER, J.)

**Landlord and Tenant—Automatic Renewal Clause—Consideration.**

320a. *Morris v. Taylor*, Gen. No. 22222. *Held*: (1) A provision as to the renewal of a tenancy in case lessee fails to give notice of his intention to vacate is not a mere covenant which may be specifically enforced in chancery or on which an action at law may be maintained for the breach of the covenant, but is the present demise in case the lessee does not give written notice of his intention to vacate the premises within the time fixed by the lease. (2) The contract embodied in a lease is an entire one, and the same consideration which supports the other provisions of the lease will support the provision that the failure of the lessee to give the notice provided for in the lease, shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor. Affirmed. (HOLDOM, J.)

**Contracts—Accord and Satisfaction—Necessary Elements.**

321a. *Obermeyer v. Wisconsin Dairy Farms Co.*, Gen. No. 22252. *Held*: To constitute an accord and satisfaction there must be an honest dispute between the parties, a tender with the explicit understanding of both parties that it was in full payment of all demands, and an acceptance by the creditor with the understanding that the tender is accepted in full payment. Reversed and remanded. (McSURELY, P. J.)

**Evidence—Improbable Statements by Interested Parties.**

322a. *Rose v. Chicago City Ry. Co.*, Gen. No. 21364. *Held*: The testimony of an interested witness as to facts inherently improbable, need not be accepted by a court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness is not otherwise impeached. Reversed and remanded. (PAM, P. J.)

**Practice—Failure to File Appeal Bond Within Specified Time.**

323a. *Booth v. Harting*, Gen. No. 22413. *Held*: Where the time allowed for the filing of the bond has expired without any extension of the time during the term, or within the time originally allowed, the court loses jurisdiction to extend the time. Appeal dismissed. (GOODWIN, J.)

**Affirmed on the Facts.**

324a. *Flynn, City Treas. v. Niblack, Recvr.*, Gen. No. 22506. Affirmed on a review of the record. (GOODWIN, J.)

OPINIONS FILED JUNE 26, 1916.

**Crimes—Obtaining Money by False Pretenses—Omission in the Information.**

325a. *People v. Rosenberg*, Gen. No. 22169. *Held*: The omission of the statutory word "designedly" in an information charging a defendant



## APPELLATE COURT DIGEST

with obtaining money by false pretenses is not fatal where the information avers with particularity representations of things done, with a negative averment as to their performance; the existence of such facts would be impossible without knowledge and design on the part of the defendant, therefore knowledge and design will be implied. Affirmed. (McSURELY, P. J.)

### Judgment Notes—Pleading—Leave “To Plead to Plaintiff’s Declaration”—Is Demurrer a “Plea” in Such Cases?

326a. *Feldman v. Polishuck*, Gen. No. 22216. *Held*: The motion for leave to plead to a declaration, where a judgment has already been entered by confession, is addressed to the equitable jurisdiction of the court. This would imply that there should be brought to the attention of the court facts or matters constituting a meritorious defense, that is, facts which if proven would induce the court to be of the opinion that it would work an injustice to permit the judgment to stand. When, therefore, the court, in the exercise of its equitable discretion, has entered an order giving leave to defendant “to plead to the declaration,” the use of the word “plead” must be confined to the original and technical sense in which the word is used, and does not include demurrer. Affirmed. (McSURELY, P. J.)

### Contracts—Offer and Acceptance—Conditional Acceptance.

327a. *U. S. Lithograph Co. v. American Ironing Machine Co.*, Gen. No. 22243. *Held*: Where one offers to do a definite thing and another accepts it conditionally or introduces a new, his answer is either a mere expression of willingness to negotiate further, or it is a counter proposal, but in neither case is there a contract. The acceptance must be in the identical terms contained in the offer. Reversed and judgment here. (McSURELY, P. J.)

### Reversed on the Facts and Judgment Here.

328a. *Stricker v. Umbdenstock*, Gen. No. 22294. Judgment reversed and judgment here on a review of the record. (McSURELY, P. J.)

### Negotiable Instruments—Checks Payable in Foreign Currency—Measure of Damages—Parol Evidence.

329a. *Warnock v. Fleming*, Gen. No. 22296. *Held*: (1) When suit is brought upon a check or other obligation payable in a foreign or depreciated currency, the measure of damages is the value of such foreign or depreciated currency at the time such check or other obligation should have been paid, with interest to the time of judgment. (2) Where a check does not purport to express the entire contract between the parties, parol evidence is admissible to show the character of the transaction and intention of the parties. Affirmed. (McSURELY, P. J.)

### Affirmed on the Facts.

330a. *Helm v. Ill. Commercial Men’s Assn.*, Gen. No. 21038. Affirmed on a review of the record. (McGOORTY, J.)

## OPINIONS FILED JULY 20, 1916.

### Practice—Pending Writ of Error—Substitution of Parties.

331a. *Old Rose Distilling Co. v. Parkhill*, Gen. No. 21257. *Held*: (1) The pendency of a writ of error cannot be invoked to abate another similar action, unless the former operates as a *supersedeas*. (2) A substitution of parties defendant does not in itself constitute a new cause of action. (McDONALD, J.)

### Sales—Implied Warranty—Acceptance.

332a. *Ross-Attley Lumber Co. v. Columbia Hardwood & Lumber Co.*, Gen. No. 21312. *Held*: So long as a buyer can, without self-contradiction, declare that the goods are not to be taken in fulfillment of the contract, he has not accepted them. Reversed and remanded. (McGOORTY, J.)

**Reversed on the Facts.**

333a. *Densby v. Umbricht*, Gen. No. 21317. Reversed and remanded on a review of the record. (McGOORTY, J.)

**Reversed on the Facts.**

334a. *Brand v. Rueter*, Gen. No. 21322. Reversed and remanded on a review of the record. (BARNES, P. J.)

**Affirmed on the Facts.**

335a. *Fisher v. Dunn*, Gen. No. 21337. Affirmed on a review of the record. (McGOORTY, J.)

**Reversed on the Facts.**

336a. *Bower v. Pike*, Gen. No. 21372. Reversed and remanded with directions on a review of the record. (McDONALD, J.)

**Affirmed on the Facts.**

337a. *Ingraham v. Mariner*, Gen. No. 21389. Affirmed on a review of the record. (McDONALD, J.)

**Practice—Appeal—Motion Pending.**

338a. *McCoy v. Acme Automatic Printing Co.*, Gen. No. 21392. *Held*: Where, at the time an appeal is taken, there is pending before the trial court a motion to vacate the judgment from which the appeal is prosecuted, that judgment is not final, and such appeal is prematurely taken. Appeal dismissed. (McDONALD, J.)

**Workmen's Compensation Act—Award—Construction of Statute.**

339a. *Ryan v. Chicago Foundry Co.*, Gen. No. 21398. *Held*: Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons. An award signed by two of three arbitrators, under the Workmen's Compensation Act, is therefore good. (BARNES, P. J.)

**Building and Loan Associations—Insolvency—Right to Charge Members With Premiums in Settling Affairs.**

340a. *Couch v. Lake Shore Building Association*, Gen. No. 21401. *Held*: A borrowing stockholder of a building and loan association is chargeable with the earned premium, from the date of the loan to the date of insolvency. Affirmed. (McDONALD, J.)

**Crimes—Plea of "Guilty," on Suggestion of Court.**

341a. *People v. Glick*, Gen. No. 21598. *Held*: The plea of guilty shall not be entered until the court shall have fully explained to the accused the consequences of his plea. Reversed and remanded. (BARNES, P. J.)

**Adultery—Status of Woman—Proof.**

342a. *People v. Green*, Gen. No. 22092. *Held*: (1) In cases of adultery, where it is shown that the defendant was married and undivorced at the time the acts took place, it is unnecessary to prove the status of the female party to the adulterous acts. (2) By the statute it is provided that the offense of adultery shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy—and does not require proof by direct evidence of any single act of adultery. Affirmed. (McDONALD, J.)

**Affirmed on the Facts.**

343a. *People v. Rice*, Gen. No. 22135. Affirmed on a review of the record. (McGOORTY, J.)

## APPELLATE COURT DIGEST

### Reversed on the Facts.

344a. *People v. Ness*, Gen. No. 22259. Reversed and remanded on a review of the record. (McGOORTY, J.)

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### Insurance—Reversed on the Facts.

345a. *Krum v. Union Casualty Ins. Co.*, Gen. No. 21231. Reversed on a review of the record. (BARNES, P. J.)

### Reversed on the Facts.

346a. *Kaufman v. Chicago, Indianapolis & Louisville Ry. Co.*, Gen. No. 21266. Reversed and remanded on a review of record. (McGOORTY, J.)

### Negotiable Instruments—Section 52 of Practice Act Construed When Authority to Make an Assignment Cannot be Questioned—Pleading Effect of Averment of Indorsement by Payee.

347a. *Wilson v. Menagh*, Gen. No. 21276. *Held*: (1) The affidavit required by section 52 of the practice act, denying the execution or assignment of an instrument in writing sued upon, cannot be made by an agent but must be made by the party to the suit making such denial. (2) When the assignment has not been put in issue by the verification required by statute, the authority to make such assignment cannot be questioned. (3) When the pleading avers the indorsement to be that of the payee, then it can only be questioned by defendant's own affidavit, which may be on information or belief, and when not so questioned, it must be held to have been the payee's assignment. Affirmed. (BARNES, P. J.)

### Affirmed on the Facts.

348a. *Divine v. Union Elevated R. R. Co.*, Gen. No. 21342. Affirmed on review of the record. (McGOORTY, J.)

### Carriers—Effect of Announcement of Station—Negligence—When Presumed.

349a. *Wood v. Illinois Central Ry. Co.*, Gen. No. 21349. *Held*: (1) The mere announcement of a station is not an invitation to alight either from the train while it is in motion or into darkness several hundred feet away from the station, or at the point where the trains usually stop. (2) Passengers must take the responsibility of informing themselves concerning the everyday incidents of railway travel. (3) Negligence cannot be presumed where nothing is done out of the usual course of business, unless the course itself is improper. There must be some special circumstances calling for more particular care or caution, in order to create liability. Reversed on facts. (BARNES, P. J.)

### Reversed on Facts.

350a. *Cohn v. Carlowitz and Co.*, Gen. No. 21367. Reversed on a review of the record. (BARNES, P. J.)

### Corporations—Liability of Officers and Agents for Debts of Corporation.

351a. *Ryerson & Son v. Jacobs*, Gen. No. 21382. *Held*: In a corporation *de pire*, its officers and agents transacting business in its name, are not liable as co-partners. Affirmed. (BARNES, P. J.)

### Reversed on the Facts.

352a. *Mark v. Mitchell*, Gen. No. 21421. Reversed and remanded on a review of the record (McGOORTY, J.)

### Workmen's Compensation Act—"Enterprise."

353a. *North v. Board of Trustees of the University of Illinois*, Gen. No. 21432. *Held*: Methods of instruction in an educational institution involving the use of materials designated in the Act cannot be deemed as embraced within the term "enterprise" in subdivision 6 and 7, paragraph (b), section 3 of the Workmen's Compensation Act of 1913. Reversed. (BARNES, P. J.)

**Affirmed on the Facts.**

354a. *Hockaday & Co. v. C., M. & St. P. Ry. Co.*, Gen. No. 21440. Affirmed on a review of the record. (BARNES, P. J.)

**Contract—Reversed on Facts.**

355a. *Brennan v. Ideal Heating Co.*, Gen. No. 21443. Reversed on a review of the record. (McDONALD, J.)

**Reversed on the Facts.**

356a. *Levy v. Swift & Co.* Gen. No. 21462. Reversed on a review of the record. (BARNES, P. J.)

**Contracts of Indemnity—Rules of Construction.**

357a. *Smith v. Eitelson*, Gen. No. 21464. *Held*: (1) A contract of indemnity should be strictly construed. Where an instrument is complete and unambiguous on its face, extraneous evidence is inadmissible to vary or augment its terms. (2) Where parties have executed several instruments contemporaneously, relating to the same subject matter, all of the instruments should be construed together in determining the real intention of the parties. Affirmed. (McDONALD, J.)

**Affirmed on the Facts.**

358a. *Freeman v. Gould*, Gen. No. 21489. Affirmed on a review of the record. (BARNES, P. J.)

**Contracts—Offer and Acceptance.**

359a. *Gullick v. Peter Schoenhofen Brewing Co.*, Gen. No. 21506. *Held*: An offer may be revoked or withdrawn at any time before it is accepted and acceptance communicated to the other party, for, until then, there is neither agreement nor consideration. Reversed with finding of fact. (McDONALD, J.)

**Practice—Petition for Change of Venue.**

360a. *City of Chicago v. Walker*, Gen. No. 21509. *Held*: A petition for a change of venue cannot become a part of the record unless preserved by certificate of evidence or bill of exceptions. Affirmed. (McGOORRY, J.)

**Reversed with Finding of Fact.**

361a. *Marks v. John Hancock Mutual Fire Insurance Co.*, Gen. No. 21519. Reversed with finding of fact, on review of the record. (BARNES, P. J.)

**Equity Jurisdiction—Vexatious Litigation.**

362a. *Catherwood v. Hokanson*, Gen. No. 22522. *Held*: (1) A court of equity will not restrain the prosecution of a suit in a foreign jurisdiction unless a clear equity is presented requiring the interposition of the court to prevent a manifest wrong and injustice. (2) When complete relief can be had where litigation is pending, the institution of foreign proceedings will be regarded as a vexatious harassing of the opposite party. Reversed. (BARNES, P. J.)

**Warrant of Attorney—Uncertainty as to Parties—Cured by Judgment.**

363a. *New City Produce Co. v. Wall*, Gen. No. 21545. *Held*: In the absence of a bill of exceptions, an apparent uncertainty as to parties must be held to have been cured by the judgment. (McDONALD, J.)

**Appeal and Error—Weight of the Evidence.**

364a. *Kniat v. Tiedge*, Gen. No. 21557. *Held*: Where the record presents merely a question of the credibility of witness and the story accepted is not improbable, an appellate court will not usually disturb the trial court's findings. Affirmed. (BARNES, P. J.)

## APPELLATE COURT DIGEST

### Landlord and Tenant—Tenant's Duty to Repair.

365a. *Burlingham v. Gordon*, Gen. No. 21562. *Held*: (1) In the absence of a covenant by the lessor to repair, it is incumbent upon the lessee to keep the leased premises in repair during the term of the lease. (2) Where a lease is for a parcel only of the entire premises, the responsibility for the remainder is upon the landlord. *Affirmed*. (McDONALD, J.)

### Landlord and Tenant—Duty to Improve—Constructive Eviction.

366a. *Hansen v. Stein*, Gen. No. 21570. *Held*: (1) A landlord is not liable to his tenant for the value of improvements voluntarily made by the latter, in the absence of an agreement creating such liability; the tenant's right extending no further than to remove them before the expiration of his term. (2) When improvements are made with the assent of the landlord and for his benefit, the law will imply an obligation to pay for them; but merely standing by without objecting will not suffice; there must be some act and encouragement from the landlord to entitle the tenant to charge the landlord. (3) Constructive eviction cannot exist without a surrender of possession by the tenant. *Reversed*. (McGOORTY, J.)

### Reversed with Finding of Fact.

367a. *Billman v. Epstein*, Gen. No. 21576. *Reversed with finding of fact* on a review of the record. (BARNES, P. J.)

### Contracts—Measure of Damages for Incorrect Transmission of Message—Burden of Proof.

368a. *Fox v. Western Union Telegraph Co.*, Gen. No. 21579. *Held*: (1) From the mere fact that there is an error in the transmission of a plaintiff's message it does not necessarily follow that the difference between the price quoted and the price transmitted is the measure of plaintiff's damage. (2) The burden of proving damages resulting from failure to correctly transmit a message is on plaintiff. (3) In the absence of proof of other damage resulting from failure to correctly transmit a message, plaintiff is entitled to recover the amount which he paid defendant for sending the message, with interest. *Reversed*. (McDONALD, J.)

### Reversed on the Facts.

369a. *Complete Artificial Stone Co. v. Dyniewics*, Gen. No. 21582. *Reversed and remanded* on a review of the record (McGOORTY, J.)

### Negotiable Instruments—Failure of Consideration—Burden of Proof.

370a. *Wilson v. Wilson*, Gen. No. 21586. *Held*: Failure of consideration being an affirmative defense, the burden of proving it is on the defendant. *Affirmed*. (McDONALD, J.)

### Affirmed on the Facts.

371a. *First National Bank v. Chicago Sanitary Ray Co.*, Gen. No. 21601. *Affirmed* on a review of the record. (McGOORTY, J.)

### Reversed with Finding of Fact.

372a. *Fruchs v. Kearns*, Gen. No. 21609. *Reversed with finding of fact* on a review of the record. (BARNES, P. J.)

### Pleading—Setting Forth Cause of Action—Municipal Court Act.

373a. *Kusmierczyk v. Schlitz Brewing Co.*, Gen. No. 21619. *Held*: Under the Municipal Court Act, the statement of claim in a tort action need present only such information as will reasonably inform defendant of the nature of the case he must defend and need not set forth the specific act of negligence committed by the defendant or that the plaintiff was in the exercise of due care at that time. *Affirmed*. (McDONALD, J.)

**Affirmed on the Facts.**

374a. *White City Electric Co. v. Fleckles*, Gen. No. 21630. Affirmed on a review of the record. (BARNES, P. J.)

**Pleading—Joining of Co-Partners.**

375a. *John O'Donnell v. W. J. Turner Co.*, Gen. No. 21644. *Held*: In a suit on a partnership contract, all the ostensible members of the co-partnership must be joined, and a judgment against one only, is invalid. Reversed and rewarded. (McDONALD, J.)

**Insurance—Death Caused by External Cause.**

376a. *McCormick v. National Live Stock Insurance Co.*, Gen. No. 21659. *Held*: Death caused by stumbling and falling while running must be deemed accidental and such a death implies an external and violent agency as its cause. Affirmed. (BARNES, P. J.)

**Contract—Remedies for Breach.**

377a. *Chicago Washed Coal Co. v. Whitsett Coal and Mining Co.*, Gen. No. 21663. *Held*: Where one party commits a breach of contract, the innocent party thereto may treat the contract as rescinded and recover upon a *quantum meruit* so far as he has performed; or he may keep the contract alive for the benefit of both parties, being ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover upon the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance and sue for the profits he might otherwise have realized. Affirmed. (McDONALD, J.)

**Practice—Setting Aside of a Judgment.**

378a. *Kramp v. Thexton*, Gen. No. 21673. *Held*: The Superior Court has the discretionary power, at any time during the term at which an order or decree in a cause has been entered, whether it be interlocutory or final, to vacate and set it aside, for such cause as may be necessary to promote justice. Decree affirmed. (McGOORRY, J.)

**Contracts—Offer and Acceptance.**

379a. *Hayes v. Whitenton*, Gen. No. 21676. *Held*: An offer may be revoked or withdrawn at any time before it is accepted and acceptance communicated to the party, for, until then, there is neither agreement nor consideration. Reversed and remanded. (McDONALD, J.)

**Reversed on the Facts.**

380a. *The Stag Company v. Union Bank of Chicago*, Gen. No. 21688. Reversed on a review of the record. McGOORRY, J.)

**Affirmed on the Facts.**

381a. *Dranicki v. Oglosinski*, Gen. No. 21706. Affirmed on a review of the record. (McGOORRY, J.)

**Contract—Composition Agreement.**

382a. *Brande Bros. v. Vehon and Bros.*, Gen. No. 21724. *Held*: Where a debtor fails to pay the percentage stipulated in a composition agreement within the time specified therein, the original debt is renewed and the creditor may collect the entire amount. Reversed and judgment here. (McDONALD, J.)

**Reversal of Judgment—Sufficiency of Abstract.**

383a. *Dunbar v. Eisenstein and Isenstein*, Gen. No. 21737. *Held*: The abstract upon which a reversal of a judgment is sought must be sufficient fully to present every error and exception relied upon and the failure to file such a sufficient abstract is ample justification for affirming the judgment of the court below. Affirmed. (McDONALD, J.)

## APPELLATE COURT DIGEST

### Practice—Affidavit of Merits in Municipal Court of Chicago.

384a. *Heilman v. Katz*, Gen. No. 21751. *Held*: It shall not be sufficient for a defendant in his affidavit of merits to deny generally the facts alleged by the statement of claim, but each party shall deal specifically with each allegation of which he does not admit the truth, except allegations of damages. Any denial of any allegation of fact made by the opposing party must not be evasive, but must answer the point of substance. Affirmed. (McDONALD, J.)

### Chattel Mortgages—Foreclosure—Duty of Bailee of Mortgaged Chattel.

385a. *Frame v. Harder's Fireproof Storage and Van Co.*, Gen. No. 21818. *Held*: The general rule is that a bailee is not permitted to set up a *jus tertii*, or title of a third person, in himself. But where the bailor has no valid title, the bailee may, on demand, deliver the goods bailed to the rightful owner, and this would be a good defense to an action brought by the bailor, the *onus* being on the bailee to establish the defense. Reversed with finding of fact. (McDONALD, J.)

OPINIONS FILED OCTOBER 18, 1916.

### Pleading—Evidence Insufficient to Sustain Amount of Judgment; When Such Contention is Available.

386a. *Israelstam v. United States Casualty Co.*, Gen. No. 20862. *Held*: The contention on the part of the appellant that the evidence is insufficient to sustain the amount of the judgment cannot be first made in the reply brief. (O'CONNOR, P. J.)

### Affirmed on the Facts.

387a. *Young v. County of Cook*, Gen. No. 21053. Affirmed on a review of the record. (GOODWIN, J.)

### Reversed on the Facts.

388a. *Morris & Co. v. Heitman Lithograph Co.*, Gen. No. 21165. Reversed on a review of the record. (GOODWIN, J.)

### Contracts—Implied Obligations.

389a. *Page-Davis Co. v. Shaddock*, Gen. No. 21226. *Held*: Anyone agreeing to furnish a course of instruction, in the absence of a special contract, binds himself to exercise reasonable skill and judgment, and ordinary care and diligence in furnishing the instruction. Affirmed. (GOODWIN, J.)

### Practice—Judges of County Courts Hearing Cases in Municipal Court.

390a. *Deddo v. Volpe*, Gen. No. 21246. *Held*: The authority of judges of the Municipal Court to request judges of county courts to hold branches of the Municipal Court is expressly given by Section 13 of the Municipal Court Act. Affirmed. (GOODWIN, J.)

### Affirmed on the Facts.

391a. *De Wolf v. Marshall Field & Co.*, Gen. No. 21321. Affirmed on a review of the record. (TAYLOR, J.)

### Personal Injuries—Liability of an Inn-Keeper on Negligence.

392a. *Rice v. Hotel Warner Co.*, Gen. No. 21327. *Held*: The relation existing between an inn-keeper and his guest is much like that existing between a common carrier and its passenger, and, while not an insurer of the personal safety of the guest, the proprietor of the hotel is held, and ought to be held, to the exercise of a very high degree of care for the protection of his guests against the negligent acts of servants employed therein. Affirmed. (GOODWIN, J.)

**Affirmed on the Facts.**

393a. *Clark v. Conrad*, Gen. No. 21329. Affirmed upon a review of the record. (TAYLOR, J.)

**Affirmed on the Facts.**

394a. *Sullivan v. Catholic Order of Foresters*, Gen. No. 21360. Affirmed upon a review of the record. (O'CONNOR, P. J.)

**Affirmed on the Facts.**

395a. *Nelson v. The Hemlaudet Co.*, Gen. No. 21370. Affirmed on a review of the record. (O'CONNOR, P. J.)

**Reversed on the Facts.**

396a. *Kaber v. Borland*, Gen. No. 21377. Reversed upon review of the facts with a finding of fact. (O'CONNOR, P. J.)

**Affirmed on the Facts.**

397a. *Walter v. Dillmer*, Gen. No. 21396. Affirmed on a review of the record. (GOODWIN, J.)

**Workmen's Compensation Act—Railroad Employees Injured in Interstate Commerce.**

398a. *Miller v. Illinois Central R. R. Co.*, Gen. No. 21402. *Held*: Workmen's Compensation Act has no application to injuries received by railroad employes while both the employe and the railroad company are engaged in interstate commerce, but the employer's liability in such case is governed exclusively by the Federal Employers' Liability Act, and this, too, regardless of the question of negligence or want of negligence of either party. Reversed and remanded with directions. (O'CONNOR, P. J.)

**Affirmed on the Facts.**

399a. *Heifendach v. White City Construction Co.*, Gen. No. 21407. Affirmed on remittitur on a review of the record. (O'CONNOR, P. J.)

**Criminal Libel—Justification.**

400a. *People v. Taylor*, Gen. No. 21777. *Held*: The plea of justification, in a prosecution for criminal libel, is an affirmative plea, and costs upon the defendant, the burden of proof. Affirmed. (GOODWIN, J.)

**Larceny—Defect in Information—Failure to Move to Quash.**

401a. *People v. Eli*, Gen. No. 22141. *Held*: Where there is no motion to quash, the motion in arrest of judgment would not reach defects in the information, for whatever is included in or is necessarily implied from an express allegation need not be otherwise averred. Affirmed. (TAYLOR, J.)

**Bastardy—Evidence that Relatrix was Unmarried.**

402a. *People ex. rel. Mikarszyk v. Wenglarz*, Gen. No. 22278. *Held*: In a trial for bastardy, where there is a total absence, of testimony or circumstances tending to prove in the slightest degree that the relatrix was married, or where there is no contention or suggestion on the trial that the evidence did not establish the fact she was unmarried, then on appeal, it must be presumed that the evidence was sufficient to justify the court in finding that she was unmarried. Affirmed. (O'CONNOR, P. J.)

OPINIONS FILED OCTOBER 30, 1916.

**Affirmed on the Facts.**

403a. *Walsh v. City of Chicago*, Gen. No. 22110. Affirmed on a review of the record. (HOLDOM, J.)



# ILLINOIS APPELLATE COURT CASES MONTHLY DIGEST

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## IN THE FIRST DISTRICT

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**Affirmed on the Facts.**

404a. *Tribune Co. v. McCarthy*, Gen. No. 22248. Affirmed on a review of the record. (HOLDOM, J.)

**Reversed on the Facts.**

405a. *Horowicki v. Globe Mutual Life Ins. Co.*, Gen. No. 22291. Reversed and remanded on a review of the record. (McSURELY, P. J.)

**Divorce—Dispute as to Fact of Marriage Raised in Cross Bill.**

406a. *Paul v. Paul*, Gen. No. 22299. *Held*: (1) A sworn bill of an appellant averring the marriage, answer by appellee admitting such marriage, and cross-bill of appellee again averring the marriage, is sufficient proof to warrant the Chancellor in holding that the relation of husband and wife is proven. (2) A fact averred by a complainant and admitted by the defendant, needs no further proof. Affirmed. (HOLDOM, J.)

**Divorce—Adultery—Proof—Testimony of Detectives.**

407a. *Ovenu v. Ovenu*, Gen. No. 22348. *Held*: (1) While adultery may be established by circumstantial evidence, such proofs must convince the mind affirmatively that actual adultery was committed, as nothing short of the carnal act can lay foundation for a divorce. (2) It is the law that the testimony of detectives is to be scanned closely and regarded with suspicion, and where such testimony is contradicted by credible evidence, the Chancellor has the right to disregard it. Affirmed. (HOLDOM J.)

**Principal and Agent—Right to Demand Commissions.**

408a. *Woolf v. Hamberger*, Gen. No. 22354. *Held*: In order to be entitled to commissions it is indispensable that a broker should show that he has produced a customer ready and willing to take the property on the terms specified, or that his efforts were the procuring cause of the sale which the principal has made to the purchaser with whom he has been brought into communication. Reversed and judgment here. (HOLDOM J.)

**Affirmed on the Facts.**

409a. *Weber v. City of Chicago*, Gen. No. 22359. Affirmed on a review of the record. (McSURELY, P. J.)

**Reversed on the Facts.**

410a. *Liljegren v. Kropp Forge Co.*, Gen. No. 22371. Reversed on a review of the record. (McSURELY, P. J.)

**Reversed on the Facts.**

411a. *McGurk v. Chicago City Ry. Co.*, Gen. No. 22377. Reversed on a review of the record. (McSURELY, P. J.)

**Contracts—Statute of Frauds—Mutuality—Specific Performance.**

412a. *Parker v. Sargent*, Gen. No. 22386. *Held*: (1) An oral agreement for the purchase and sale of any interest in real estate cannot form the basis of any suit, either at law or in equity, when the Statute of Frauds is pleaded as a defense. (2) If for any reason one of the parties cannot compel a specific performance, neither can the other party enforce specific performance. Affirmed. (McSURELY, P. J.)

## APPELATE COURT DIGEST

OPINIONS FILED OCTOBER 30, 1916.

### Mortgages—Rights of a Vendor Who Pays Mortgage Indebtedness After Devising Mortgaged Land.

413a. *Howard v. Burns*, Gen. No. 21424. *Held*: Where the owner of land sells it subject to a mortgage executed by himself, the land in equity becomes a primary fund for the payment of the debt, and the vendor occupies the position of surety, and upon payment of the mortgaged debt is entitled to be subrogated to the rights of the creditor the same as is any other surety. *Affirmed.* (HOLDOM, J.)

### Pleading—Dual Cause of Action—Necessity for Giving Reasons in Support of a Motion to Strike a Statement of Claim from the Files.

414a. *Hurt v. Keating*, Gen. No. 22268. *Held*: To avail of a variance in a statement of claim or of the statement of a dual cause of action in a motion to strike such statement from the files, reasons therefor must be given to the trial judge. Such defects can be cured by amendment. Where a motion to strike is unaccompanied by reasons, such defects cannot be taken advantage of on a review of the case, but are cured by verdict. *Affirmed.* (HOLDOM, J.)

### Practice—Contested Divorce Cases Heard by a Master in Chancery—Act of 1874.

415a. *Hall v. Hall*, Gen. No. 22282. *Held*: Although the Act of 1874, providing that in default divorce cases the court shall proceed to hear the cause by examination of witnesses in open court, contains no express prohibition against referring a contested divorce cause to a master to take proofs and report his conclusions of law and fact; still such a practice is directly contrary to the spirit of the law and is unwarranted. *Reversed and remanded with directions.* (HOLDOM, J.)

### Reversed on the Facts.

416a. *Thornton v. Helwick*, Gen. No. 22285. *Reversed with judgment of nil capiat* on a review of the record. (HOLDOM, J.)

### Contracts—Conditions Precedent.

417a. *Bowman & Bull Co. v. Linn*, Gen. No. 22305. *Held*: In an action for breach of contract, before a plaintiff can recover damages for the alleged breach he must allege and prove that he, himself, has complied with all the provisions of the contract upon his part; if both parties are in default neither can maintain an action for the other's breach. *Reversed with judgment of nil capiat.* (HOLDOM, J.)

### Reversed on the Facts.

418a. *Smith v. Peter Schoenhofen Brewing Co.*, Gen. No. 22311. *Reversed on a review of the record.* (McSURELY, P. J.)

### Evidence—Parol Testimony to Vary a Written Instrument.

419a. *Hills v. Hopp*, Gen. No. 22314. *Held*: The rule that parol testimony is inadmissible to vary a written instrument is not applicable to memoranda made by one party for his own convenience in keeping his own records of which the other party is ignorant, for the other party is in no way bound by such memoranda. *Reversed and remanded.* (McSURELY, P. J.)

### Corporations—Stock Subscriptions—Effect of Failure to Comply with Statutory Provisions—Effect of Payment by Third Person.

420a. *Central Trust Co. v. Crawford*, Gen. No. 22319. *Held*: (1) In absence of fraud as to the valuation of merchandise taken in payment for stock and where no one has been prejudiced, failure to have property appraised by commissioners as provided by statute will not render a stockholder liable *ipso facto* to respond to a judgment for an unpaid balance to

his subscription. Failure to comply with the statute in this respect does not *ipso facto* create a liability for a stock subscription. (2) When stock has been paid for by any person, the obligation of the subscriber is fulfilled and neither the corporation nor any creditor can charge him with an amount remaining unpaid, because, in fact, nothing remains unpaid. Affirmed. (McSURELY, P. J.)

**Partition Suit—Affirmed on the Facts.**

421a. *Cann v. Gloss*, Gen. No. 22325. Affirmed on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

422a. *Zenisek v. Chicago Consolidated Bottling Co.*, Gen. No. 22330. Affirmed on a review of the record. (McSURELY, P. J.)

**Procedure—Function of Judge and Jury in Determining Fraud in a Stipulation to Dismiss Suit—Relief in Equity.**

423a. *Mangler v. Maryland Casualty Co.*, Gen. No. 22339. *Held*: (1) Although it is for the jury to decide whether a release was fraudulently obtained, in the case of a stipulation to dismiss suit, the court may ascertain whether the parties knew what they were signing. (2) Fraud in the inducement is cognizable only in a proceeding in chancery. Affirmed. (McSURELY, P. J.)

**Affirmed on the Facts.**

424a. *Cann v. Hughes*, Gen. No. 22342. Affirmed on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

425a. *H. D. Smith & Co. v. Aurora Automatic Co.*, Gen. No. 22345. Affirmed on a review of the record. (HOLDOM, J.)

**Contracts—Conditional Sale—Purchaser for Value—Effect of Possession of Personal Property.**

426a. *Lyon & Healy v. Walldren*, Gen. No. 22351. *Held*: (1) If a person agrees to sell another a chattel on condition that the price should be paid within a certain time, retaining title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with an apparent ownership, a bona fide purchaser or execution creditor of the latter is entitled to protection as against the claim of the original vendor. (2) The party in possession of personal property is presumed to be the owner of it. Affirmed. (HOLDOM, J.)

**Affirmed on the Facts.**

427a. *Neville v. City of Chicago*, Gen. No. 22358. Affirmed upon remittitur upon a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

428a. *Hunt v. Hunt*, Gen. No. 22368. Affirmed on a review of the record. (HOLDOM, J.)

**Assignment of Debts—Assumption by a Corporation of the Debts of the Partnership Which It Succeeds.**

429a. *Interstate Finance Corporation v. Commercial Jewelry Co.*, Gen. No. 22374. *Held*: Where a corporation carries on its books the liabilities of the partnership it succeeds, it is estopped to deny that the liability in question is its obligation. Affirmed. (McSURELY, P. J.)

**Personal Injury—Failure of Automobile Driver to Look for Approaching Car—Contributory Negligence as a Matter of Law.**

430a. Gen. No. 22380. *Held*: It is contributory negligence as a matter of law for an automobile driver to drive across a street-car track without looking for an approaching car when sufficiently near to ascertain whether

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or not there is an approaching car in sight, and yet not so near but that he could control his machine and avoid the danger. Reversed. (McSURELY, P. J.)

### Practice—Who Are Parties—Who May Appeal or Bring Writ of Error—When Right to Bring Error Will Be Presumed.

431a. *Herndon v. Herndon Corporation—Appeal of Vanderbilt v. Bartsch*, Gen. No. 22391. Held: (1) The mere filing of a claim with a receiver is not sufficient to make the claimant a party to the proceedings. (2) Even the filing of a petition for leave to intervene, in absence of an order granting such petition, does not make the petitioner a party to a suit. (3) In order to call in question a judgment or decree before an appellate tribunal by a writ of error or appeal, appellant must be either a party to the record or sustain some mutual or successive relationship to the subject matter of the litigation, out of which arises the right, duty or privilege to have the judgment reviewed, or he must have some direct or collateral interest injuriously affected by the judgment upon which he can rest a right to review. (4) Where the writ is sued out by a party to the record, his right appears from the face of the proceedings, and it will be inferred that such right continues to the hearing unless challenged by a plea in abatement, but where the writ is sued out by one not a party to the record, his right thereto must affirmatively appear from his assignment of errors. Appeal dismissed. (McSURELY, P. J.)

### Mandamus—Dual Relief—Failure to Plead the Ordinance Creating the Office.

432a. *Weydert v. City of Chicago*, Gen. No. 22401-2. Held: (1) A petition for mandamus praying for dual relief is obnoxious to a general demurrer. (2) The fact that petitioners were pensioners during the time they suffered the disability contracted in the service of the Fire Department, gives them no additional claim either for their reinstatement in office or to be reinstated upon the pension roll after their discharge. (3) A petitioner for mandamus which fails to plead an ordinance creating the office sought by the petitioner is obnoxious to a demurrer. Reversed and remanded with directions. (HOLDOM, J.)

### Practice—Review of Interlocutory Orders—Who May Appeal from an Order Appointing a Receiver—Personal Objections to Receiver.

433a. *Evans v. Illinois Surety Co.—In re Appeal of P. J. Lucey*, Gen. No. 22559. Held: (1) The only interlocutory orders reviewable are those granting an injunction, or overruling a motion to dissolve same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed. (2) Orders as to parties in a proceeding, and like orders, are not reviewable except upon final decree. (3) Right to review interlocutory orders is statutory. (4) In an appeal from an order appointing a receiver, it is not necessary to wait until appellant's interest is determined because the manifest purpose of the statute is to afford a speedy and summary review of the proceedings by a defendant who may deem himself to be injured by the order of the lower court. (5) The personality of a receiver is not a proper subject for review within the statute granting right to review interlocutory orders, and his appointment is purely discretionary with the chancellor. Affirmed. (McSURELY, P. J.)

OPINIONS FILED NOVEMBER 14, 1916.

### Procedure—Appointment of a Special State's Attorney.

434a. *People v. Illinois Life Insurance Co.*, Gen. No. 21456. Held: To recover the penalty provided by Sec. 29, of Chap. 73, Hurd's R. S. 1911, "in the name of the People of the State of Illinois by the State's Attorney" any other mode of procedure to recover such penalty is excluded, and the counsel for the people must appear on the record to be a state's attorney. Reversed and remanded. (McGOORTHY, J.)

**Infants—Liability of Father for Necessaries—When Custody Is Awarded to Him.**

435a. *Meling v. Lamb*, Gen. No. 21477. Where husband and wife were divorced, and custody of minor son, awarded to husband, and where son was operated upon; in an action for surgical services rendered to son, against the wife, *held*: Although under Sec. 15, Chap. 68, Hurd's R. S. 1874, the wife, as well as the husband, became liable for family expenses, yet by virtue of decree of divorce, however, the relation of husband and wife no longer existed, and by the terms of such decree, the legal obligation for the necessary expenses of said minor son was imposed upon the husband. Reversed. (McGoorty, J.)

**Practice—Joint Assignment of Error—Real Property—Adverse Possession.**

436a. *Friend v. Mahin*, Gen. No. 21550. *Held*: (1) In an appeal on a writ of error by joint defendants, the assignments of error may be made jointly. They should be considered as joint and several or, joint or several, according to the nature of the error assigned, and as affecting the respective plaintiffs in error. (2) Where a vendor of land agrees to furnish vendee a complete merchantable abstract of title he cannot compel the vendee to accept title to land resting merely upon adverse possession. (Goorty, J.)

**Trial Without Jury—When Principles of Law Governing the Case Are Reviewable.**

437a. *Cermak, Bailiff of Municipal Court of Chicago, for Staver Carriage Co. v. American Surety Co.*, Gen. No. 21626. *Held*: It is a well-settled rule of law that in a trial without a jury it is not only necessary to submit propositions of law to the trial court, but also to preserve in the record the rulings of the court on such propositions before this court can review the principles of law governing the case. Judgment affirmed. (McGoorty, J.)

**Agency—Personal Liability of Agent—Instructions.**

438a. *Stone v. Kreis*, Gen. No. 21648. *Held*: (1) Where an agent discloses the fact of his agency, or where the other party knows at the time that he is acting as such agent, the latter will not be liable, unless he binds himself to be responsible. (2) Each party has the right to have the jury instructed upon his theory of the case, if it had a basis in the evidence upon which to rest. Reversed and remanded. (McGoorty, J.)

**Affirmed on the Facts.**

439a. *Mueller v. Wargny*, Gen. No. 21691. Affirmed on a review of the record. (BARNES, P. J.)

**Administrators—When Personally Liable.**

440a. *Harill v. Newton*, Gen. No. 21697. *Held*: Whenever an administrator or executor takes property not belonging to the estate of which he has charge, and appropriates it as an asset thereof, he commits a tort for which he becomes personally liable, whether sued in tort or in contract. Reversed and remanded. (McDONALD, J.)

**Creditors' Bill—Return "Nulla Bona" Presumption of Fraudulent Transfer—Service of Process—Waiver.**

441a. *Iles v. Heidenreich*, Gen. No. 21708. *Held*: (1) To constitute presumptive or legal fraud is necessary both to aver and prove insolvency at the time of the gift; the return of the execution *nulla bona* establishes *prima facie* insolvency only at the time of its return. (2) Entry of appearance without objection, or pleading to the merits after an adverse ruling upon a motion to quash the summons, waives defects of process and service, and confers jurisdiction of the person. Reversed and remanded. (BARNES, P. J.)

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### Interpleader—Decree Should Only Decide Right to Property.

442a. *Iles v. Heidenreich*, Gen. No. 21709. *Held*: The only relief properly sought by a bill of interpleader is that which effectually discharges the petitioner from any further liability with respect to the fund or property to which the adverse claims are made. It is aside from its purpose to litigate any other claim than that of a right to the property. Reversed with instructions to modify decree. (BARNES, P. J.)

### Reversed on the Facts.

443a. *Zimmer, Sheriff, v. Cummings, Trustee*, Gen. No. 21712. Reversed and remanded on a review of the record. (McDONALD, J.)

### Common Carriers—Liability of the Initial Carrier for Demurrage Charges of a Connecting Carrier.

444a. *P. C. C. & St. L. Ry. Co. v. Hedrich*, Gen. No. 21715. *Held*: (1) An initial carrier is not liable for the acts of a connecting carrier after transportation has ceased. (2) Demurrage charges are no part of and are separate and distinct from transportation charges, and do not arise, if at all, until the transportation has ended. Reversed. (McGOORRY, J.)

### Forgery—Where Acts of Uttering Are Not Necessary.

445a. *Mid-City Trust and Savings Bank, a corporation, v. National Surety Co., a corporation*, Gen. No. 21721. *Held*: False writings, apparently for defrauding and manifestly made with intent to defraud constitute forgeries to which the act of uttering is not necessary. Affirmed. (BARNES, J.)

### Attractive Nuisance—Elements of Liability for Injury to Child.

446a. *White v. Boydsen and Snyder*, Gen. No. 21728. *Held*: (1) In an action to recover for damages for injuries sustained by a minor child for alleged attractive nuisance, an essential condition to liability is that the attractive thing, or something inseparably connected with it, must be the proximate cause of the injury. (2) Another necessary element of liability for an injury to a child so attracted is that the thing which causes the injury is tempting to children and to constitute a means of attracting them upon the premises which the owner should anticipate. The dangerous thing must be so located as to attract them from the street or some public place where they may be expected to be. Reversed and remanded. (McGOORRY, J.)

### Divorce—Effect of Statute Allowing Temporary Alimony During the Pendency of Appeal or Writ of Error.

447a. *Longhi v. Longhi*, Gen. No. 21735. *Held*: An appeal is still pending within the meaning of the statute (Hurd's R. S. 1916, Sec. 15, Ch. 40) empowering a trial court to grant and enforce equitable alimony during the pendency of appeal or writ of error, although there has been an order of affirmance, if a stay of mandate has been ordered. Affirmed. (BARNES, P. J.)

### Practice—Assignment of Error.

448a. *Webster v. Olson*, Gen. No. 21741. *Held*: (1) Assignments of error filed in a former proceeding, which relate only to proceedings anterior to the final decree cannot bring up the final decree for review. (2) A writ of error must agree with the record, and in order to bring up for review by a writ of error, all who were defendants in the original suit, who are alive, must join in the writ of error, so that the whole case may be disposed of, and that the record may agree with the record below. Writ dismissed. (McGOORRY, J.)

### Contracts—Uncertainty—Liability of Guarantor—Parties.

449a. *Harman Co. v. Kastor*, Gen. No. 21744. *Held*: (1) A court cannot make a new contract for the parties, and cannot presume that they intended to insert in their written contract a provision "other or different from that which the plain language used would tend to indicate, and then

give a construction to the contract which would be legitimate if the contract contained the supposed omitted provision." (2) The undertaking of a guarantor is to be construed strictly and he is bound to the extent and in the manner and under the circumstances pointed out in his obligation, and no further, and his liability is not to be extended by implication. (3) Where a third person merely annexes his name to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative part of the contract. His signature in such a case can only be regarded as an expression of his assent to the act of the parties in making the contract. Affirmed. (BARNES, P. J.)

#### Reversed on the Facts.

450a. *Fair v. City of Chicago*, Gen. No. 21772. Reversed and remanded on a review of the record. (McGOORTHY, J.)

#### Common Carriers—When Consignee Becomes Liable for Charges.

451a. *C. I. & L. Ry. Co. v. Monarch Lumber Co.*, Gen. No. 21787. *Held*: Where a consignee accepts a shipment consigned to him, he then becomes liable to pay carrier the lawful transportation charges which have accrued. It is not necessary that the shipment be physically delivered to the consignee to bind the latter for the charges. An exception may be shown by the action of conduct of the consignee in giving orders to have the shipment delivered to some other person. Affirmed. (McDONALD, J.)

#### Appeal—Jurisdiction of Justice of the Peace.

452a. *Hughes v. Dobson*, Gen. No. 21821. *Held*: On appeal, the jurisdiction of a justice of the peace is to be determined from facts appearing in evidence. Affirmed. (McGOORTHY, J.)

#### Foreclosure—Recipient of Proceeds During Redemption Period—Expenditures of Receiver.

453a. *Stevens v. Pearson et al.*, Gen. No. 21839. *Held*: (1) When the mortgagee or in *que trust* has the right to have the security foreclosed and the property sold and the proceeds applied in payment of the secured debt, the mortgage or trust deed has expended its force and the property is no longer subject to its provision, and unless mortgagor was made personally liable for the incumbrance or the deficiency by the device of foreclosure, he is entitled to the rents and profits of the premises during the period of redemption. (2) When, by provision of the trust deed, the grantors agree that a receiver shall be appointed to take possession or charge of said premises and collect the income thereof, such provision is valid and a receiver may be appointed in the event of a deficiency, within the discretion of the court. Affirmed. (McDONALD, J.)

#### Practice Act—Time Within Which to File a Bill of Exceptions.

454a. *Spieks v. Insull*, Gen. No. 21848. *Held*: The provision of Sec. 81 of our Practice Act, Ch. 110, R. S. of Illinois, requiring that presentation of a stenographic report to the trial court for authentication be made during the term in which judgment is rendered applies as well to all records of the court proceedings, whether in the form of a stenographic report, a bill of exceptions or a certificate of evidence. Affirmed. (McDONALD, J.)

#### Practice—Entry of a Nunc Pro Tunc Order After the Term Has Expired.

455a. *Kilroy v. McGovern*, Gen. No. 21861. *Held*: The recitals in a bill of exceptions are insufficient to warrant the entry of a *nunc pro tunc* order after term time; the fact that a particular order has been made by the court at a previous term, if it is not of record, can only be shown by the production of some note or memorandum from the records or quasi records of the court made during that term. Reversed and remanded. (McDONALD, J.)



# ILLINOIS APPELLATE COURT CASES

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## IN THE FIRST DISTRICT

Opinions Digested by Student Editors, Turnbull, Breyer, Carson,  
Marshall, Price, Segal, Coon, Golding and Sherwood.

OPINIONS FILED NOVEMBER 15, 1916.

### Affirmed on the Facts.

456a. *People v. Stromberg*, Gen. No. 22355. Affirmed on a review of the record. (BARNES, P. J.)

### Reversed on the Facts.

457a. *Labowitch v. Labowitch*, Gen. No. 22654. Reversed on a review of the record. (MCDONALD, J.)

### Creditor's Bill—Rights of a Bona Fide Purchaser of Debtor's Property.

458a. *Burr v. Wentworth*, Gen. No. 22669. *Held*: (1) Where there is an interlocutory order appointing without notice a receiver of the property of a judgment debtor, possession taken by him is subject to any valied lien acquired by another in good faith to which the property was subject at the time of his appointment. (2) Where the receiver takes possession of property belonging to a third party or over which the third party has a superior claim, the latter may apply to the court appointing the receiver for its restoration. Affirmed. (BARNES, P. J.)

### Reversed on the Facts.

459a. *Iles v. Heidenreich*, Gen. No. 22554. Reversed and remanded on a review of the record. (BARNES, P. J.)

OPINIONS FILED NOVEMBER 15, 1916.

### Affirmed on the Facts.

460a. *Cowin v. Arctic Fur Shop*, Gen. No. 20125. Affirmed on a review of the record. (O'CONNOR, P. J.)

### Contract—Attorney's Fees.

461a. *Gary v. Beadles*, Gen. No. 21293. *Held*: In an action in assumpsit to recover for legal services it is a valid defense that plaintiff undertook to represent conflicting interests and discharge inconsistent duties, no matter how honest may have been his motives and intentions. Reversed and remanded. (O'CONNOR, P. J.)

### Persons—Construction of Statute in Relation to the Adoption of Children.

462a. *People v. Wetzel*, Gen. No. 22295. *Held*: (1) In the act to revise the law in relation to the adoption of children (Hurd's R. S. 1913, p. 34) the provision that all persons so named in such petition shall be made defendants does not include the child. (2) According to the same act, although the place of residence of the parents is omitted from the petition, it will not deprive the court of jurisdiction, if that fact appears otherwise on the record. (GOODWIN, J.)

### Practice—Conclusion of Law.

463a. *Evangelical Lutheran Congregation of Lemont v. Bethards*, Gen. No. 22740. *Held*: The allegation that "irreparable damage will be done" is a conclusion of law and is not good without facts to show it. Reversed. (GOODWIN, J.)

**Practice—When Review of Findings of Fact Will Be Denied.**

464a. *Weber v. Krueger*, Gen. No. 21196. *Held*: Where none of the evidence heard on the trial is in the record, there can be no review of the findings of fact made by the trial court. Affirmed. (O'CONNOR, P. J.)

**Negligence—When An Employee Is Acting Within the Scope of His Duties—Effect of Negligence of Vice-Principal—Practice—Reversible Error.**

465a. *Pierce v. Chicago City Ry. Co.*, Gen. No. 21363. *Held*: (1) When a conductor whose car has just been switched into position, finds that it is within a minute of leaving time, readjusts the trolley pole for the purpose of getting his car started on the instant, he is performing an act within the scope of his duties. (2) The negligence of a direct representative of the master is, in law, equivalent to the negligence of the master himself. (3) Refusal to instruct a jury to find a defendant not guilty as to certain counts which were not supported by the evidence is not reversible error if the evidence is sufficient to sustain the allegations contained in any one valid count. Affirmed. (GOODWIN, J.)

**Bills and Notes—Rights of Holder Who Takes Paper With Knowledge of an Executory Contract for Which Paper Was Given—When a Defendant Is Estopped from Setting Up Alterations.**

466a. *La Salle Extension University v. Hamilton College of Law*, Gen. No. 21369. *Held*: (1) Where one acquires negotiable paper with knowledge that the same was given on an executory contract but before any breach has occurred, the holder of such paper is under no duty to keep watch as to the carrying out of the executory contract between the maker and the payee but may enforce such paper against the maker even although there is a subsequent failure to perform on the part of the payee. (2) Where a defendant has formally admitted the text of a note sued on and his omission in his pleadings and throughout the trial in the court below has failed to claim any alteration has taken place, he is estopped from raising such point on appeal. Affirmed. (TAYLOR, J.)

**Appeal Bonds—What Operates to Discharge Sureties Thereon.**

467a. *Hengen v. Skene*, Gen. No. 21379. *Held*: Where there has been an order for the payment of alimony *pendente lite* from which order an appeal is taken, a subsequent decree ordering the payment of permanent alimony will not operate to discharge the surety on the appeal bond filed upon the entry of the decree for payment of temporary alimony. Affirmed. (TAYLOR, J.)

**Evidence—When Expert Testimony Is Admissible—Practice—Immaterial Errors—Damages—When Excessive.**

468a. *Fillippi v. Spring Valley Coal Co.*, Gen. No. 21394. *Held*: (1) When the facts upon which opinions are founded cannot be made intelligible, opinions of witnesses may be received. (2) Where the judgment of the court below can be sustained upon the common law counts, any error which may have intervened which affects the right of recovery under the statutory counts is not material. (3) A court of review in deciding whether damages awarded are excessive cannot be unmindful of the fact that the money value of life and health is appreciating and the purchasing power of money steadily diminishing during recent years. Affirmed. (O'CONNOR, P. J.)

**Forcible Entry and Detainer—Acts Sufficient to Justify Suit Therefor—Nature of Action—Paramount Title Not a Defense.**

469a. *Kraatz v. Workman*, Gen. No. 21410. *Held*: (1) An invasion of property while it is obviously in the possession of another and has been for a period of over forty years and which invasion is against the will and protest of the one in possession of the property is an entry by force

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and justifies the institution of a suit for forcible entry and detainer. (2) The proceedings of forcible entry and detainer are wholly statutory and involve only possessory rights and do not allow one who makes a tortious entry to set up a defense of paramount title. Affirmed. (TAYLOR, J.)  
**Reversed on the Facts.**

470a. *Martin v. Coe*, Gen. No. 22006. Reversed on a review of the record. (GOODWIN, J.)

**Practice—When Suit in Another Jurisdiction Will Be Restrained—Contents of Interlocutory Motion—Sufficiency of Petition.**

471a. *Wallace v. Weldahl*, Gen. No. 22630. *Held*: (1) Where the subject-matter of the litigation, as far as the rights of the plaintiff are concerned, is the same as in a case pending in a foreign court, and where the domestic court obtains jurisdiction of the parties and property prior to the foreign court, the plaintiff is entitled by an interlocutory motion to petition the chancellor to restrain the defendants from prosecuting in a foreign court any litigation pertaining to the property already involved in the case in the domestic court. (2) When an interlocutory motion is made to restrain suit in another jurisdiction, the Chancellor takes judicial notice of all the proceedings in the case and of all that the record discloses. (3) Where a petition deals with a subject with which, it may be assumed, the defendants are more familiar than the petitioner, no more is required than such a statement as will properly apprise them of the suit.

**Act for More Effectual Suppression of Places Used for Purposes of Prostitution, Etc., Construed—When Petition Must Accompany Bill—Chancery Practice—Opportunity for Hearing—Mode of Granting Relief—Nature of Prayer Necessary to Sustain Issuance of Preliminary Injunction—Failure to Serve All Defendants No Bar to Preliminary Injunction—Sufficient Verification of Bill Cures Insufficient Verification of Petition.**

472a. *People v. Eisenberg*, Gen. No. 22662. *Held*: (1) Upon the filing of a bill which contains sufficient allegations and is properly verified, a preliminary injunction may be obtained and no petition need be filed. (2) It is only where the bill is not verified or does not contain sufficient allegations that a petition is necessary. (3) Legislature did not intend that the practice and procedure under this act should be different from that followed in other chancery cases. (4) The policy of the law is that no one shall be deprived of any substantial right even temporarily without first being heard in his own defense. (5) Where the allegations of the bill and the proof in support thereof entitle the complainant to relief, it may be granted under the prayer for general relief, even if contrary to a special prayer. (6) A prayer for an injunction, although not for a temporary injunction, will sustain issuance of a preliminary injunction. (7) It is not a prerequisite to the issuance of a preliminary injunction that all the defendants are served with summons. (8) Although the verification of a petition is insufficient, where the verification of the bill is sufficient, this defect is immaterial. Reversed. (O'CONNOR, P. J.)

OPINIONS FILED NOVEMBER 27, 1916.

**Pleading—Necessity of Fully Stating Facts Constituting a Defense in the Statement of Meritorious Defense—Set-off of an Unliquidated Claim—Judgment Exceeding Statement of Claim.**

473a. *Reid v. McKinney*, Gen. No. 22336. *Held*: (1) Pleas, however potent they may be in interposing legal defenses, are unavailing in the Municipal Court unless facts are stated in an affidavit of meritorious defense which in law constitute a defense to the action. (2) A plea of set-off cannot set off a claim for unliquidated damages and Sec. 12, Chap. 98 R. S. limits a set-off to the amount of plaintiff's debt. (3) Objection to a

judgment on the ground that it exceeds the amounts stated in plaintiff's statement of claim cannot be made in the Appellate Court unless it was made at the time the verdict was rendered and judgment entered. Affirmed. (HOLDOM, J.)

**Practice—Finding of Fact by Appellate Court.**

474a. *Trafeket v. Chicago City Ry. Co.*, Gen. No. 22392. *Held*: The Appellate Court is not restrained, as the trial court is, from determining the probative force of the evidence, and when such evidence in its judgment fails to sustain a recovery, it may reverse the judgment with a finding of fact. Reversed with Finding of Fact. (HOLDOM, J.)

**Pleading—Sufficiency of Averment of Existence of Ordinance—Mandamus—Necessary Showing to Secure Reinstatement to Office—Necessary Construction of Authority to Establish a Bureau—How Time Should Be Computed—Section 10 of Civil Service, How Construed—Petition—When Obnoxious to Demurrer—Effect of Petition Good in Part.**

475a. *People ex. rel. v. Coffin*, Gen. No. 22396. *Held*: (1) An averment that the city council has passed a certain ordinance establishing a certain department and then setting forth the ordinance in *haec verba* is a sufficient averment of the passage and existence of the ordinance and it is not necessary to set forth the different steps taken in its passage. (2) A person seeking reinstatement to an office by writ of mandamus must show the legal existence of the office, and his right thereto as a matter of law. (3) Authority to establish a bureau of itself imports the organization of an officered department. (4) In computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days, therefore where work is measured by the month, it is to be calculated from the day the employe begins work to the day numerically corresponding to that day in the following month less one. (5) The language of the statute, "at or before the expiration of the period of probation the head of the department \* \* \* may discharge," together with the clause that "if he is not then discharged his appointment shall be deemed complete," must be construed to mean that the appointee, under the provisions and method prescribed by the civil service act and the rules may be discharged at any time within the six months, to take effect at once or at the end of probation, but if the period of probation is permitted to go by without a discharge the appointee comes under the provision of the statute which says the appointment shall be deemed complete. (6) A petition seeking reinstatement of the relator and the collection of back salary is not obnoxious to demurrer because seeking two kinds of relief. (7) If the petitioner has asked for some relief that he has shown himself clearly entitled to, the petition is still good, even though he may have sought some relief he cannot obtain. Affirmed. (McSURELY, P. J.)

476a. Gen. No. 22397. Affirmed on a review of the record. (McSURELY, P. J.)

**Status of Chicago Civil Service Commission—Power of Civil Service Commissioners to Create or Abolish Offices—Power of City Council to Create Offices—Section 18 of Civil Service Act Construed—Effect of Failure of Provision for Salary—Words Necessary for Creation of an Office—Award of Execution Against a Municipality, a Technical Error—How Corrected.**

477a. *People, ex. rel. v. City of Chicago*, Gen. No. 22398. *Held*: (1) The Civil Service Commission is not an independent body but is one of the departments or bureaus of the City of Chicago and the persons, therefore, in the positions, or offices in this department are employees of the city and come under the provisions of the act requiring classification. (2) The civil service commissioners have no power either to create or abolish an office.

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(3) There is nothing in the civil service act prohibiting the city council from creating an office or assigning such office to any department of the municipality the council might deem desirable. (4) Section 18 of the civil Service Act was designed to limit the commissioners in the expenses which they might incur, and not to limit the city council in the amount of its appropriation. (5) It does not necessarily follow that failure of the provision for salary prohibits the creation of an office. (6) It is not necessary for the creation of an office that the council declare in express words that such office is created. (7) Express language creating the title of an office carries with it the implication of the creation of the office itself. All that is necessary is language clearly showing an intent to create the office in question. (8) It is error to award an execution against a municipality for costs, but this is a technical error which may be corrected in a court of review by an order directing the court below to amend its record in this respect. Affirmed. (McSURLY, P. J.)

### Harmless Error—Special Interrogatory—Refusal to Submit, When Proper—Instructions—How to be Construed.

478a. *Vos v. Franke*, Gen. No. 22405. *Held*: (1) Where counsel for a plaintiff asks questions which should not have been asked, but the ruling of the court on objection to them, promptly made by defendant's counsel, was a sufficient curative and in view of the evidence and amount of the verdict, it cannot be said that the defendant was prejudiced thereby, such errors are not of a reversible character. (2) Where a special interrogatory is not single and direct or does not relate to an ultimate or controlling fact in the case, it is properly refused. (3) Instruction must be taken and read as a whole. Affirmed. (HOLDOM, J.)

### Affirmed on the Facts.

479a. *Vondra v. Felcran*, Gen. No. 22411. Affirmed on a review of the record. (HOLDOM, J.)

### Practice—Effect of Recitals in a Decree.

480a. *Hartman v. Gratch*, Gen. No. 22414. *Held*: Where the evidence which the decree recites was heard has been omitted from the record, it will be assumed that the findings in the decree are supported by such evidence. Affirmed. (HOLDOM, J.)

### Chancery Practice—Necessity of Preserving Evidence by a Certificate of Evidence or by Finding of Specific Facts in the Decree—Contempt for Failure to Pay Alimony.

481a. *Mueller v. Mueller*, Gen. No. 22417. *Held*: (1) A party in whose favor a decree granting relief is entered must preserve the evidence by a certificate of evidence, or the decree must find the specific facts that were proven on the hearing; if not, an order finding defendant guilty of contempt for failure to comply will be reversed on appeal. Recital of legal conclusions in the decree is not sufficient. (2) An order finding a husband in contempt for failure to pay alimony must be based on a showing that the husband's financial ability and circumstances are such that he can pay the amount ordered. Reversed and Remanded. (McSURLY, P. J.)

### Pleading—Waiver of Demurrer to Replication by Filing Rejoinder—Error to Effect Reversal Must Appear on the Abstract of the Record—Application to Municipal Corporations of Sec. 55, Chapt. 110 R. S., Requiring an Affidavit of Meritorious Defense—Burden of Proof on Defendant in Plea of Payment.

482a. *McGovern v. City of Chicago*, Gen. No. 22420. *Held*: (1) The filing of a rejoinder to a replication waives a prior demurrer to such replication and questions raised by the demurrer cannot be availed of on review. (2) The abstract of the record is the pleading of the party seeking to have

such record reviewed upon appeal or by writ of error, and the error relied upon to effect a reversal of the judgment must appear in the abstract, although the court will search the record, regardless of the abstract, to affirm. (3) Sec. 55, Chap. 110, R. S., requiring an affidavit of meritorious defense to be filed with pleas, where plaintiff files with his declaration an affidavit showing the nature of his demand, is binding upon municipal corporations. (4) A defendant is restricted to the defense set up in his affidavit of meritorious defense, notwithstanding other pleas in the record. (5) A plea of payment must be proved by the defendant by a preponderance of the evidence. Affirmed. (HOLDOM, J.)

**Affirmed on the Facts.**

483a. *Sans Souci Park v. Anderson*, Gen. No. 22423. Affirmed on a review of the record. (McSURELY, J.)

**Personal Injuries—Effect of Street Car's Superior Right of Way on Tracks in Determining Negligence.**

484a. *Wanamaker v. Chicago City Ry. Co.*, Gen. No. 22440. *Held*: It is not error for a court to refuse to instruct the jury that street cars have a superior right over other vehicles upon that portion of the street occupied by the tracks, for such an instruction is calculated to mislead and can in no way properly aid the jury in reaching a conclusion as to defendant's negligence or plaintiff's contributory negligence. Affirmed. (McSURELY, P. J.)

**Corporations—Construction of Statute.**

485a. *People of the State of Illinois v. Mascot Copper Company*, Gen. No. 22431. *Held*: (1) The statute relating to corporations which provides that "It shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this state correct books of account of all its business, and every stock holder in such corporation shall have the right at all reasonable times to examine the records and books of account of the corporation has no application to a foreign corporation not doing business in this state. (2) Having an office within this state for the convenience of the corporation in managing some of its internal affairs, all of its property and chief offices being situated in the state of its creation, where most of its officers also reside, does not constitute doing business in this state. Affirmed. (HOLDOM, J.)

**Reversed on the Facts.**

486a. *Sanderson v. Chicago City Ry. Co.*, Gen. No. 22437. Reversed on a review of the record. (McSURELY, P. J.)

**Reversed on the Facts.**

487a. *Buckmaster v. Monighan Machine Co.*, Gen. No. 22447. Reversed on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

488a. *Akin v. Nolan*, Gen. No. 22450. Affirmed on a review of the record. (HOLDOM, J.)

**Agency—Payment of Insurance Premiums.**

489a. *Ellenbogen v. Frankfurt General Insurance Co.*, Gen. No. 22452. *Held*: The payment of an insurance premium to an agent who holds the policy for delivery to the assured protects him against the further claims of the company—for such possession of the policy clothes the agent with apparent authority to receive the premium regardless of actual authority. Affirmed upon Remittitur; Otherwise Reversed and Remanded. (McSURELY, P. J.)



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**Personal Injury—Power to Reverse a Verdict of Jury.**

490a. *Joseph v. Chicago City Railways Company*, Gen. No. 22464. *Held*: Where the verdict of a jury is manifestly contrary to the preponderating force of the evidence, it is incumbent upon this court to reverse with its findings of fact. *Reversed.* (HOLDOM, J.)  
**Reversed on the Facts.**

491a. *Laski v. National Council, Knights and Ladies of Security*, Gen. No. 22467. *Reversed* on a review of the records. (McSURELY, P. J.)

**Pleading—Unanswered Pleas.**

492a. *Ferguson v. White Oak Coal Company*, Gen. No. 22470. *Held*: One good plea without challenge by answer or replication stands confessed as to the matters therein set forth by way of defense, and one good plea in bar being confessed, operates to bar the plaintiff from judgment on that count regardless of whether the other pleas are good or bad. *Reversed* with a finding of fact. (HOLDOM, J.)

**Affirmed on the Facts.**

493a. *Seawell v. Oregon Short Line R. R. Co.*, Gen. No. 22807. *Affirmed* on a review of the record. (McSURELY, P. J.)

OPINIONS FILED DECEMBER 18, 1916.

**Practice—Judicial Notice of Rules of Municipal Court.**

494a. *Loghi v. Sabatini*, Gen. No. 21451. *Held*: The Appellate Court cannot take judicial notice of the rules of the Municipal Court of Chicago. *Affirmed.* (DEVER, J.)

**Affirmed on the Facts.**

495a. *People v. Gravis*, Gen. No. 22083. *Affirmed* on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

496a. *Jackson v. Browning, King & Co.*, Gen. No. 22088. *Affirmed* on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

497a. *Malmin v. Sternheim*, Gen. No. 22150. *Affirmed* on a review of the record. (DEVER, J.)

**Bills and Notes—Title—Devolution in Case of Intestacy.**

498a. *Forrest v. Delaney*, Gen. No. 22161. *Held*: Subject to payment of debts and the cost and expenses of administration, the personal property of a wife leaving a husband surviving, but no descendants, vests in the surviving husband. This rule applies in case of notes, and a husband surviving gets title to the note, without endorsement and in case of his decease prior to the death of the wife, it goes to his executor or administrator. *Affirmed.* (HOLDOM, J.)

**Reversed on the Facts.**

499a. *Conrad v. Hess*, Gen. No. 22164. *Reversed* on a review of the record. *Reversed* and judgment here. (McSURELY, P. J.)

**Agency—Respondeat Superior.**

500a. *Goldschmied v. National Council, Knights and Ladies of Security*, Gen. No. 22199. *Held*: When the local lodge of a fraternal benefit society knows that applicant for membership is in a prohibited business and nevertheless issues to him a benefit certificate, the society is held to have waived the right, under its by-laws and the provisions of the application for membership, to nullify the benefit certificate so issued. *Affirmed.* (DEVER, J.)

**Bills and Notes—Negotiable Instruments Law—Notice of Presentment and Dishonor.**

501a. *Anshen Co. v. Iglowitz*, Gen. No. 22220. *Held*: Due presentment and notice of dishonor are necessary to charge an indorser; and failure to give such notice discharges such indorser from liability. Reversed and judgment here. (HOLDOM, J.)

**Affirmed on the Facts.**

502a. *Mankowitz v. Kersten Co.*, Gen. No. 22233. Affirmed on a review of the record. (McSURELY, J.)

**Personal Injuries—Negligence Per Se—Duty of Operators of Street Car.**

503a. *Marks v. Chicago City Railway Co.*, Gen. No. 22247. *Held*: (1) Undoubtedly a failure to look or listen, especially where it is affirmatively shown that looking or listening might have enabled the party exposed to see the train, and thus avoid being injured, is evidence tending to show negligence. But it is not conclusive evidence, so that a charge of negligence can be predicated upon it as a matter of law. There may be various modifying circumstances excusing the party from looking or listening, and that being the case, a mere failure to look or listen cannot, as a legal conclusion, be pronounced negligence *per se*. (2) A street railway company is charged with the knowledge that the public may lawfully use the entire street, and it must, in operating its cars on the streets, employ all reasonable means to avoid injuring those whom it knows may rightfully use that part of the streets occupied by its tracks. Reversed and remanded. (DEVER, J.)

**Attachment—Fraud Overcoming Effect of Schedule of Exemptions.**

504a. *A. J. Bates Co. v. Jacobs*, Gen. No. 22276. *Held*: When a defendant on a writ of attachment has been guilty of fraud in assigning or concealing his effects and property, judgment should go against him on the writ of attachment even though the goods levied on are included in the schedule of exemptions. Reversed and remanded. (McSURELY, P. J.)

**Practice—Reversal of Judgment.**

505a. *Edwards v. Prest-o-Lite Co.*, Gen. No. 22308. *Held*: When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect was obviated, so as not to affect injuriously in the final judgment the rights of the parties against whom the error was committed, it should not be allowed to work a reversal. Affirmed. (HOLDOM, J.)

**Affirmed on the Facts.**

506a. *Miller v. Burns*, Gen. No. 22317. Affirmed on a review of the record. (DEVER, J.) (McSURELY, J.)

**Contracts—What Constitutes Acceptance of an Offer—Counter Proposals.**

507a. *White & Co., v. Tarnowsky*, Gen. No. 22444. *Held*: To make a contract, a proposition made must be unconditionally accepted. The interpolation of any new condition or any departure from the exact terms of the proposition in any written acceptance constitutes a new offer, and before the parties are bound, such new offer must be unconditionally accepted by the party making the original proposition. Reversed and judgment here. (HOLDOM, J.)

**Contracts—Affirmation of Contract Made While a Minor.**

508a. *Fried v. Overland Motor Co.*, Gen. No. 22445. *Held*: Where a thing is purchased during the minority and is kept and used by the minor until his arrival at legal age and then converted to his own use, such con-

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duct amounts to an election to stand by the contract made during minority. Affirmed. (McSURELY, P. J.)

### Contracts—Measure of Damages.

509a. *Schaefer v. Elser*, Gen. No. 22446. *Held*: The measure of damages is to be sought in the contract made by the parties; and where the amount of damages is not fixed by the contract, the natural proximate injury occasioned by the breach of duty is, within the contemplation of the parties, the measure of damages. Reversed and remanded. (DEVER, J.)

### Practice—Appeal—Judgments Non Obstante Veredicto.

510a. *Bennett et al. v. Baxter*, Gen. No. 22449. *Held*: (1) When the defense embodied in the affidavit of merits, defendant's pleading in the action, does not state facts which if uncontradicted would entitle defendant to prevail, the motion for judgment *non obstante veredicto* should be granted. (2) When the claim is for a liquidated amount the Appellate Court will render final judgment. Reversed and judgment here. (HOLDOM, J.)

### Contracts—Statute of Frauds.

511a. *Lake View Hospital Ass'n and Training School for Nurses v. Nicholson*, Gen. No. 22453. *Held*: Where goods, money or services are furnished to a third person at the request and upon the credit of the promisor, the undertaking is original and the Statute of Frauds does not apply. Affirmed. (McSURELY, P. J.)

### Evidence—Admissibility in Evidence of Actions of Deceased at Time of Death.

512a. *Quinlivan v. Ready & Callaghan Coal Co.*, Gen. No. 22455. *Held*: Although the cause of the deceased's death is admitted, evidence may be introduced to show the conduct of the deceased at and just before the time of his death, as bearing on the questions of lack of care of the defendant. Reversed and remanded. (DEVER, J.)

### Affirmed on the Facts.

513a. *Baskes v. Evening American Publishing Co.*, Gen. No. 22459. Affirmed on a review of the record. (HOLDOM, J.)

### Affirmed on the Facts.

514a. *J. Austin Dunn Specialty Co. v. Dunn*, Gen. No. 22472. Affirmed on a review of the record. (McSURELY, P. J.)

515a. *People v. Wojcsekowski*, Gen. No. 22490. Affirmed on a review of the record. (McSURELY, P. J.)

### Affirmed on the Facts.

516a. *Cohn v. Wolf*, Gen. No. 22491. Affirmed on a review of the record. (DEVER, J.)

### Practice—Trial Without Jury—Motion for Non-Suit.

517a. *Kelly v. Chicago City Railway Co.*, Gen. No. 22495. *Held*: (1) In a trial before a court, without a jury, no error can be assigned on the failure of the court to grant a motion for a new trial, because no such motion is necessary, as the error, if any, in such condition arises on the Court's finding and the entry of judgment thereon. (2) A motion for a non-suit in a case tried without a jury cannot be entertained after the trial judge has announced his findings and declared his decision of the case. Affirmed. (HOLDOM, J.)

### Affirmed on the Facts.

518a. *Engels v. Manning*, Gen. No. 22497. Affirmed on a review of the record. (McSURELY, P. J.)

**Slot Machines—What Constitutes a Gambling Device?**

519a. *The Almy Manufacturing Co. v. City of Chicago*, Gen. No. 22663. *Held*: The purpose of the machine, its quality and character, the possibilities of its operation and the manner in which it is susceptible of use are controlling factors in determining whether it is a gambling device in fact or not. Reversed and remanded. (HOLDOM, J.)

**Contracts—Covenants Not to Engage in Business—Option to Terminate—Mutuality.**

520a. *Old Rose Distilling Co. v. Feuer*, Gen. No. 22997. *Held*: An option to terminate on the part of one party to a contract not to engage in a certain business within a specified time, is not a bar to suit for injunction upon the contract. Affirmed. (McSURELY, J.)

OPINIONS FILED DECEMBER 19, 1916.

**Evidence—Competency of Witness—Effect of Interest on Competency or Creditability of a Witness.**

521a. *Bellman v. Epstein*, Gen. No. 21576. *Held*: If the interest of the witness in the event of the suit is of a doubtful nature, the objection goes to the credit of the witness, not to his competency. Affirmed. (BARNES, P. J.)

**Reversed on the Facts.**

522a. *Boyd v. Foster*, Gen. No. 21675. Reversed on a review of the record. (BARNES, P. J.)

**Affirmed on the Facts.**

523a. *Johnson v. Hogg*, Gen. No. 21775. Affirmed on a review of the record. (BARNES, P. J.)

**Agency—Commission—Construction of Term "Goods Sold."**

524a. *Moore v. Wheeling Tile Co.*, Gen. No. 21827. *Held*: The terms "goods sold" implies a transfer of title which does not part until the goods ordered have been manufactured and appropriated for the purchaser, and when an agent's commission is based upon the selling price of all goods sold, it is not due and payable until such goods have been manufactured and appropriated for the purchaser. (McDONALD, J.)

**Affirmed on the Facts.**

525a. *Zulu Manufacturing Co. v. Hoffman*, Gen. No. 21830. Affirmed on a review of the record. (McGOORTY, J.)

**Reversed on the Facts.**

526a. *Johnson v. Creamery Package Mfg. Co.*, Gen. No. 21836. Reversed on a review of the record. (BARNES, P. J.)

**Affirmed on the Facts.**

527a. *Central Trust Co. of Illinois v. Kendall*, Gen. No. 21842. Affirmed on a review of the record. (McGOORTY, J.)

**Landlord and Tenant—Injury Through Failure to Repair Premises—Liability of Occupant.**

528a. *Pysik v. Feske and City of Chicago*, Gen. No. 21845. *Held*: The occupant of premises is responsible for injuries inflicted upon another by reason of the neglect or failure to keep the premises in repair. (BARNES, P. J.)

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### Workmen's Compensation Act—Construction of Sec. 8.

529a. *Gitchener & Co. v. Industrial Board of the State of Illinois*, Gen. No. 21868. *Held*: A case is brought within Sec. 8, giving compensation for loss of the sight of an eye when the usefulness of the eye is permanently lost for all practical purposes. Affirmed. (McGOORRY, J.)

### Reversed on the Facts.

530a. *People ex rel Kominsky v. Engert*, Gen. No. 21876. Reversed on a review of the record. (McGOORRY, J.)

### Affirmed on the Facts.

531a. *Kosik v. Slovak Evangelical Augsburg Denomination, Parish of Sts. Peter and Paul*, Gen. No. 21885. Affirmed on a review of the record. (McDONALD, J.)

### Affirmed on the Facts.

532a. *Chaimovits v. Formanek*, Gen. No. 21891. Affirmed on a review of the record. (BARNES, P. J.)

### Estoppel by Verdict—Effect of Absence of Exact Identity of Parties in Both Suits—Application of Doctrine Where Two Proceedings Are in Different Forms.

533a. *Gounaris v. Pavlakos and Kascos*, Gen. No. 21921. *Held*: (1) It is no objection to the operation of the prior verdict as an estoppel that the present action includes some parties not joined in the former action, provided the judgment was rendered on its merits, and provided the cause of action in the two suits is the same, and the party against whom the estoppel is set up was actually a party to the former litigation. (2) It is immaterial that the first suit was at law and the second in chancery when the relief given in the second suit is not peculiar to equity nor dependent on the enforcement of equitable principles, but is merely a money judgment. Reversed. (BARNES, P. J.)

### Attachment—Action by Third Party Interpleaded in a Wrongful Attachment—Construction of Secs. 4 and 5 of Chapter 11, R. S. of Ill., in Regard to Right to Sue at Common Law.

534a. *First State Bank of Pond Creek, Oklahoma v. Clark*, Gen. No. 21915. *Held*: (1) Where a third party has been deprived of possession and use of his property by the wrongful suing out and levying of an attachment writ, it is not necessary to prove malice and want of probable cause on the part of the attachment plaintiff. (2) Secs. 4 and 5 of Chap. 11, R. S. of Ill. do not restrict the third person so injured to a suit on the attachment bond. Suit may be brought either in tort or on the bond. Affirmed. (McDONALD, J.)

### Reversed on the Facts.

535a. *Barnes v. Barnes*, Gen. No. 21926. Reversal on a review of the record. (McDONALD, J.)

## IN THE SECOND DISTRICT

Opinions Digested by Student Editor John L. Turnbull.

OPINIONS FILED APRIL 19, 1916.

### Bills and Notes—Liability of Endorser—Right of Subrogation.

1b. *Kopf v. Yardy*, Gen. No. 6090. *Held*: (1) When an instrument is dishonored by non payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder. (2) Where one becomes liable as an endorser on the strength of a trust deed security, \* \* \* he has

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a right to rely on the benefit of this security, and upon the legal right with which he would become vested if compelled to pay the debt; namely to become subrogated to the rights of the holder to the security, and thus to utilize it in making himself whole. Reversed and remanded. (NIEHAUS, P. J.)

### Appeal—Defenses Not Raised at Trial.

2b. *Zukas v. Appleton Mfg. Co.*, Gen. No. 6140. *Held*: A defense not made in the court below will not be recognized on appeal. Affirmed. (CARNES, J.)

## OPINIONS FILED APRIL 26, 1916.

### Practice—Dismissal of Bill for Injunction.

3b. *Kries v. County of Rock Island*, Gen. No. 6168. *Held*: Where there are allegations in a bill which, if true, would entitle complainant to relief, even though the allegations be too general, it is error to dismiss the bill. Reversed and remanded. (DIBELL, J.)

### Affirmed on the Facts.

4b. *O'Connor v. Kennedy*, Gen. No. 6171. Affirmed on a review of the record. (NIEHAUS, P. J.)

### Debtor and Creditor—Bulk Sales Act.

5b. *Larson v. Judd*, Gen. No. 6172. *Held*: The Bulk Sales Act did not contemplate that one called upon to render personal services cannot sell the chattels, goods or other things that are appurtenant thereto unless the conditions imposed by the act are complied with. Affirmed. (CARNES, J.)

### Affirmed on the Facts.

6b. *Burkheimer v. C. R. I. & P. Ry. Co.*, Gen. No. 6210. Affirmed on a review of the record. (CARNES, J.)

### Warranty Deeds—Express Covenants—Statute of Limitations—Payment of Interest—Damages.

7b. *Chicago Mill & Lumber Co. v. Townsend*, Gen. No. 6216. *Held*: (1) A covenant is a species of express contract, and where the covenant involved expressly provides for the payment of money in the event of a breach thereof, it may be sued upon as a contract to pay money. (2) The Statute of Limitations does not begin to run until the cause of action accrues. (3) The Statute of Limitations of a foreign state does not apply unless the parties were non-residents of this state at the time the cause of action accrued. (4) Where a contract for the payment of money contains a stipulation for the recovery of interest, but does not either expressly or impliedly, fix a time from which such interest is to be computed, the interest should be computed from the date of the contract. (5) The Appellate Court has power to render such judgment for damages as the trial court should have rendered. Reversed and judgment here. (NIEHAUS, J.)

## OPINIONS FILED MAY 9, 1916.

### Affirmed on the Facts.

8b. *Jarvis v. G & J. Coal Co.*, Gen. No. 6203. Affirmed on a review of the record. (DIBELL, P. J.)

### Wife Abandonment—Husband Resident in Another State.

9b. *People v. Herrick*, Gen. No. 6229. *Held*: A husband, being resident of another state at the time information is filed against him charging wife abandonment, is not guilty of committing the offense in the county where the wife resides. Reversed and remanded. (PER CURIAM.)

## APPELLATE COURT DIGEST

### Practice—Motion to Quash Fee Bill.

10b. *Clendenia v. Adams Express Co.*, Gen. No. 6282. *Held*: In the absence of a stipulation to the contrary embodied in the bill of exceptions signed by the trial judge, the presumption prevails that the court acted correctly in refusing to quash the fee bill. Affirmed. (PER CURIAM.)

OPINIONS FILED MAY 24, 1916.

### Personal Injuries—Expert Testimony.

11b. *Strohm v. Postal Telegraph Co.*, Gen. No. 6243. *Held*: Where all the facts of a situation have been ascertained and made intelligible to the jury it is not a question for expert opinion whether the condition is safe or unsafe nor should evidence be heard of what specific things others were doing or are in the habit of doing under such circumstances. Affirmed. (CARNES, J.)

OPINIONS FILED AUGUST 10, 1916.

### Reversed on the Facts.

12b. *Siegar v. Public Service Co.*, Gen. No. 6148. Reversed and remanded on a review of the record. (CARNES, J.)

### Practice—Quo Warranto.

13b. *People v. Andrews*, Gen. No. 6235. *Held*: In a quo warranto proceeding, the defendant must either disclaim or justify; if he justifies, he must set out his title specially, and show a valid title to the office. The people are not bound to show anything. He must exhibit authority for exercising the functions of the office, or the people will be entitled to judgment of ouster. Reversed and remanded. (CARNES, J.)

### Personal Injuries—Duty of Motormen—Negligence.

14b. *Lund v. Osborne*, Gen. No. 6240. *Held*: (1) It is clearly the duty of those in control of street cars to exercise a greater degree of care and watchfulness when approaching a street crossing or intersection, than at other places along their route. (2) It is not necessary in order to constitute wilful or wanton negligence, to show ill will against the particular person injured; but an entire absence of care for the life, person or property of others, if it exhibits indifference to disastrous consequences, is sufficient. Affirmed. (NIEHAUS, P. J.)

### Practice—Bill of Exceptions.

15b. *Dairs Milk Machinery Co. v. Tappen*, Gen. No. 6243. *Held*: In the absence of a bill of exceptions setting out the evidence, it must be presumed conclusively that the verdict, which the jury rendered, was sustained by the evidence adduced at the trial. Affirmed (NIEHAUS, P. J.)

### Practice—Judgments of Foreign States.

16b. *McCloud v. Hagle*, Gen. No. 6246. *Held*: A judgment in lieu by a court of competent jurisdiction cannot be collaterally assailed in another. Affirmed. (CARNES, J.)

### Affirmed on the Facts.

17b. *Allison v. Belvidere Screw Machine Co.*, Gen. No. 6247. Affirmed. on a review of the record. (NIEHAUS, P. J.)

### Gifts Causa Mortis—Necessary Elements.

18b. *Lounsberry v. Boger*, Gen. No. 6248. *Held*: To make a valid gift *causa mortis*, the owner must not only part with its possession, but all control and dominion over the property. Affirmed. (NIEHAUS, P. J.)

**Reversed on the Facts.**

19b. *Eilers v. Peoria Ry. Co.*, Gen. No. 6250. Reversed and remanded on a review of the record. (CARNES, J.)

**Affirmed on the Facts.**

20b. *General Accident Ins. Co. v. Krekel*, Gen. No. 6252. Affirmed on a review of the record. (NIEHAUS, P. J.)

**Evidence—Telephone Conversations.**

21b. *Thede Brothers v. Matthews*, Gen. No. 6253. *Held*: If a witness identifies the voice, a conversation over the telephone is admissible, and its force as evidence depends upon whether or not the jury believes the witness. Affirmed. (DIBELL, J.)

**Bastardy—Proof.**

22b. *People v. Cutler*, Gen. No. 6254. *Held*: In prosecutions for bastardy, it is incumbent on the prosecution to establish the charge of bastardy by the weight of the evidence. Reversed and remanded. (NIEHAUS, P. J.)

**Evidence—Proof of Cause of Action.**

23b. *Ryan v. Hardy*, Gen. No. 6256. *Held*: The number of witnesses who testify in a case, is not necessarily decisive of the question of preponderance. If there are but two witnesses, and they testify diametrically opposite, concerning matters within their personal knowledge, this does not necessarily result in a lack of preponderance concerning the matters; the question of preponderance is largely a question of the credibility of the witnesses who testify; and a question for the jury. Affirmed. (NIEHAUS, P. J.)

**Affirmed on the Facts.**

24b. *Town of Magnolia v. Kays*, Gen. No. 6258. Affirmed on a review of the record. (CARNES, J.)

**Municipal Corporations—Right of Officers to Salary.**

25b. *Frederick v. City of Peoria*, Gen. No. 6260. *Held*: A city has no right to withhold from a police officer a part of his salary, because of his absence from his duties due to illness. Affirmed. (NIEHAUS, P. J.)

**Personal Injuries—Evidence.**

26b. *Pickens v. City of Kankakee*, Gen. No. 6262. *Held*: Opinions of a physician founded in part upon subjective symptoms, the knowledge of which is derived by the physician during the treatment of the patient, are competent. Affirmed. (DIBELL, J.)

**Torts—Injury to Personal Property—Measure of Damages.**

27b. *Swain v. Mehl*, Gen. No. 6274. *Held*: Where personal property has been injured by the negligence of another and cannot be repaired, the measure of damages is the difference between the market value of the property before the injury, and the value of the wreckage. Reversed and remanded. (CARNES, J.)

**Contract—Parol Evidence to Vary Terms of Written Agreement.**

28b. *Robbs Express Co. v. Forkel*, Gen. No. 6277. *Held*: It is well settled that a written contract unambiguous in the terms cannot be varied, contradicted or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed. Affirmed. (NIEHAUS, P. J.)

**Insurance—Construction of Benefit Clauses.**

29b. *Baker v. States Accident Ins. Co.*, Gen. No. 6279. *Held*: The term "necessarily confined in the house" has been repeatedly held not to



## APPELLATE COURT DIGEST

mean that the person need remain constantly in the house; the words should receive a reasonable construction with a view to the purpose for which they were intended in the insurance agreement. Affirmed. (NIEHAUS, P. J.)

### Contracts—Presumption of Abandonment.

30b. *Westchester Fire Ins. Co. v. Struck*, Gen. No. 1280. Held: Where an abandonment or waiver is relied upon it must be shown to have the clear intention of the parties to abandon the contract previously entered into. Courts will indulge no presumption in favor of waiver of a contract where specific performance is sought to be enforced; nor will they infer waiver or abandonment upon slight proof. Affirmed. (CARNES, J.)

### Reversed on the Facts.

31b. *Lewis v. New Amsterdam Casualty Co.*, Gen. No. 6281. Reversed and remanded on a review of the record. (DIBELL, J.)

### Affirmed on the Facts.

32b. *People v. Peck*, Gen. No. 6283. Affirmed on a review of the record. (DIBELL, J.)

### Affirmed on the Facts.

33b. *Remberg v. Interstate Independent Telephone and Telegraph Co.*, Gen. No. 6283-4-5. Affirmed on a review of the record. (CARNES, J.)

### Reversed on the Facts.

34b. *Sadler v. Schnellbacher*, Gen. No. 6287. Reversed on a review of the record. (CARNES, J.)

### Affirmed on the Facts.

35b. *Tindall v. C. & N. W. Ry. Co.*, Gen. No. 6288. Affirmed on a review of the record. (DIBELL, J.)

### Real Property—Damage by Drainage—Mandamus.

36b. *Stoddard v. Keefe*, Gen. No. 6291. Held: Owners of lower lands are subject without redress to damage from surface drainage of higher lands owned by others, even though waters are precipitated upon the lower lands by artificial drainage that would otherwise evaporate or seep into the soil. (2) Mandamus lies only where there is a clear legal right to have an act performed, an act that it is the defendant's duty to perform. It does not lie in a doubtful case. Affirmed. (CARNES, J.)

### Affirmed on the Facts.

37b. *Harrison Drainage Dist. v. Parker*, Gen. No. 6292. Affirmed on a review of the record. (DIBELL, J.)

### Debtor and Creditor—Assignment of Estates in Expectancy—Discharge in Bankruptcy.

38b. *Dumont, Roberts & Co. v. McDougal*, Gen. No. 6293. Held: (1) Estates in expectancy may be assigned and the assignment will be enforced in equity when it ceases to be an expectancy, and becomes a vested interest. (2) Where the assignor of such an expectancy is afterwards adjudged a bankrupt and is discharged, subsequent enforcement of the lien created by his assignment is not barred by his discharge in bankruptcy. Affirmed. (DIBELL, J.)

### Affirmed on the Facts.

39b. *Pierce v. Village of North Utica*, Gen. No. 6294. Affirmed on a review of the record. (CARNES, J.)

**Husband and Wife—Alimony Pendente Lite—Denial of Marriage.**

40b. *Nelson v. Nelson*, Gen. No. 6295. *Held*: Proof or admission of a marriage *de facto* presents a proper case for the allowance of alimony *pendente lite*, although a marriage *de jure* is denied. Affirmed. (DIBELL, J.)

**Affirmed on the Facts.**

41b. *Carr v. Carr*, Gen. No. 6297. Affirmed on a review of the record. (CARNES, J.)

**Reversed on the Facts.**

42b. *Horea v. Illinois Central Ry. Co.*, Gen. No. 6298. Reversed and remanded on a review of the record. (CARNES, J.)

**Personal Injuries—Federal Safety Appliances Act.**

43b. *Davidson v. Peoria & Pekin Union Ry. Co.*, Gen. No. 6299. *Held*: A temporary defect and failure to work of an equipment required by the Safety Appliance Act, creates a liability and subjects the defendants to the penalties and burdens imposed by that act, even though such failure arose from some defect unknown to the employer, which in the exercise of reasonable care he could not have ascertained and remedied. An averment of due care in the declaration of plaintiff is surplusage. Affirmed. (CARNES, J.)

**Affirmed on the Facts.**

44b. *Knight Light Co. v. Morrison*, Gen. No. 6301. Affirmed on a review of the record. (DIBELL, J.)

**Temporary Injunctions—Controlling Factors.**

45b. *Barrell v. Lake Forest Water Co.*, Gen. No. 6302. *Held*: Whether the status quo shall be preserved by the granting or continuance of a temporary injunction depends not only upon the probability of the case made on such a hearing, but also upon the relative injury that might be sustained by the parties by the action of the Chancellor in granting or refusing a temporary injunction contrary to what might be found on a final hearing to be the merits of the case. Reversed. (CARNES, J.)

**Reversed on the Facts.**

46b. *Farrell Admin'r v. Bruce*, Gen. No. 6303. Reversed and remanded on a review of the record. (DIBELL, J.)

**Personal Injuries—Liability of Landlord for Damage Caused on Leased Premises.**

47b. *Watson v. Hicks*, Gen. No. 6304. *Held*: A landlord is not responsible for the misconduct or neglect of his tenants, even though occasioned by the manner in which the premises were constructed, provided they were capable of being used in a proper manner, whereby no injury could have resulted. Reversed. (NIEHAUS, P. J.)

**Contracts—Tender of Damages.**

48b. *Smith v. Whitebaur*, Gen. No. 6306. *Held*: Where a tender of damages is in court, the plaintiff has a right to take it, and the acceptance of such tender does not bar him for recovering more, if more is due. Reversed and remanded. (DIBELL, J.)

**Partition of Realty—Compensation for Improvements.**

49b. *Bartholemew v. Bartholemew*, Gen. No. 6310. *Held*: In a partition, when a sale is had, those who have lawfully made improvements upon the premises are allowed by way of compensation the actual increase of the price received at the sale in consequence of the improvement. It is also true that a tenant in common in possession may make proper improvements without the consent of his co-tenant. Affirmed. (DIBELL, J.)

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### Bills and Notes—Negotiable Instruments.

50b. *Ill. Midland Ry. Co. v. Farmer's State Bank*, Gen. No. 6314. *Held*: An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. (DIBELL, J.)

### Mandamus—Petition for Vote on Saloon Question.

51b. *People v. Knoll*, Gen. No. 6318. *Held*: Where a town is not incorporated and is not laid out in streets having particular names and it is sufficient within the statute for one to sign merely the name of the town as his residence. Such signature is good and mandamus will lie against the proper officer for failure to grant the petition. Affirmed. (DIBELL, J.)

### Affirmed on the Facts.

52b. *Richard v. Brunner Foundry and Machinery Co.*, Gen. No. 6183. Affirmed on a review of the record. (NIEHAUS, P. J.)

## OPINIONS FILED OCTOBER 12, 1916.

### Personal Injuries—Liability for Injuries Caused by Electric Current—Evidence—Leading Questions.

53b. *Frazier, Admnx. v. City of Geneva*, Gen. No. 6238. *Held*: (1) Where parties undertake to wire their own property, and then apply to a light company to deliver a current to light the building, they must be assumed to take all risks resulting from the character of the wire which is put in and the method of construction which is adopted in putting it in. (2) The general rule prevailing in this country forbids leading questions on examination in chief. Revised and remanded. (DIBELL, J.)

### Affirmed on the Facts.

54b. *Meers v. Daley*, Gen. No. 6244. Affirmed on a review of the record. (NIEHAUS, P. J.)

### Affirmed on the Facts.

55b. *Woman's American Baptist Home Mission Society v. Rayburn*, Gen. No. 6248. Affirmed on a review of the record. (DIBELL, J.)

### Reversed on the Facts.

56b. *Zehr v. Zehr*, Gen. No. 6251. Reversed and remanded on a review of the record. (DIBELL, J.)

### Attractive Nuisance—Necessary Elements—Proximate Cause.

57b. *Kalman, Admnx. v. Cohen*, Gen. No. 6255. *Held*: (1) In case of injury by attractive nuisance, it must be shown that the dangerous thing was so located as to attract children from the street or from some other public place where they might be expected to be, and an owner will not be liable if he maintains something for his own use which might be dangerous but which would only be found by children going upon his premises as trespassers. (2) It is essential to liability in such cases that the attractive thing, or something in separably connected with it must be the proximate cause of injury. Affirmed. (DIBELL, J.)

### Contracts—Promises Based on Moral Obligations.

58b. *Meixner v. Western Live Stock Insurance Co.*, Gen. No. 6259. *Held*: A promise made under a sense of moral obligation is not made upon a sufficient consideration, and is not legally binding. Affirmed. (CARNES, J.)

### Personal Injuries—Coroner's Verdict as Evidence.

59b. *Swengel v. Illinois Third Vein Coal Co.*, Gen. No. 6264. *Held*: The entire verdict of a coroner's jury is competent evidence, and it is error to instruct a trial jury to disregard any part of it. Reversed. (DIBELL, J.)

**Replevin—Conditional Sales—Delivery.**

60b. *Staver Carriage Co. v. Richardson*, Gen. No. 6265. *Held*: (1) An owner of personal property will not be permitted to sell it conditionally, and deliver it to another, and successfully maintain the reservation of title in himself, as real owner, by contract, as against *bona fide* purchasers for value or execution creditors of the judgment debtor, to whom such property and the possession thereof has been delivered under a contract of conditional sale; As between the parties themselves, a conditional sales contract, with a reservation of title to personal property until payment is made therefor, is enforceable; and such a contract is valid. (2) The delivery to the vendee of the key of the warehouse in which goods are lodged, where such goods are ponderous, and incapable of being handed from one person to another, is actual delivery. *Reversed.* (NIEHAUS, P. J.)

**Affirmed on the Facts.**

61b. *Thompson v. Thompson Carnation Co.*, Gen. No. 6271. *Affirmed* on a review of the record. (CARNES, J.)

**Insurance—Nature of Contract—Right of Subrogation.**

62b. *Pontiac Mutual County Fire Ins. Co. v. Sheibley*, Gen. No. 6272. *Held*: (1) The contract of insurance is for indemnity, and if the insured receives satisfaction or part satisfaction for his loss from a wrongdoer who has caused the loss, the amount so received will be applied in full or partial discharge of the policy. (2) If the loss is not satisfied by the wrongdoer, and the insurance company pays it, it is entitled to equitable subrogation to the claim of the insured against such wrongdoer. *Affirmed* (CARNES, J.)

**Master and Servant—Mines and Miners' Act—Contributory Negligence.**

63b. *Randall, Admn'r v. Crescent Coal Co.*, Gen. No. 6293. *Held*: It is not enough under the Mines and Miners Act, to show that a defendant had an unsafe place for his servant to work. It must also be shown that servant was rightfully in that place before liability attaches to the master. *Reversed.* (CARNES, J.)

**Municipal Corporations—Establishment of Street Grades—Liability to Property Owners for Diverting Water Courses.**

64b. *Leynoud v. Village of Cherry*, Gen. No. 6286. *Held*: A grade may be established by user, and where a municipality after establishing a grade of its streets by user or ordinance cannot be permitted to abandon that grade and return surface waters to their old natural water course without incurring liability for damages occasioned abutting owners. *Affirmed.* (CARNES, J.)

**Reversed on the Facts.**

65b. *Klennenburg v. Deere & Mauser Co.*, Gen. No. 6290. *Reversed* and remanded on a review of the record. (DIBELL, J.)

**Interstate Commerce.**

66b. *Godby v. Wilson*, Gen. No. 6300. *Held*: The repair of the main track of an interstate railroad and the bringing of materials to the place of repair for that purpose are matters coming within the federal act. *Affirmed.* (DIBELL, J.)

**Personal Injuries—Negligence Per Se—Contributory Negligence—Proximate Cause—Expert Testimony.**

67b. *Fogelsang v. Peoria Ry Co.*, Gen. No. 6305. *Held*: (1) While it is true that the omission of a duty imposed by positive law is negligence per se, yet such negligence becomes actionable as a title only when it causes or contributes to the injury complained of. (2) Even though it

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appears that the injured party had been engaged in the violation of an ordinance, to bar a recovery on that ground, it must appear that such violation of the ordinance was the proximate and efficient cause of the injury.

(3) If a party suffers injury whilst violating a public law the other party being also a transgressor, he cannot recover for the injury if his unlawful act was the cause of the injury. (4) Mere surmise or conjecture cannot be regarded as proof of an existing fact or of a future condition that will result. Expert witnesses can only testify or give their opinion as to future consequences that are shown to be reasonably certain to follow. Reversed and remanded. (CARNES, J.)

### Reversed on the Facts.

68b. *Rynearson v. McCartney*, Gen. No. 6309. Reversed and remanded on review of the record. (CARNES, J.)

### Bills and Notes—Checks—Banker and Depositor—Negotiable Instruments Law.

69b. *C. B. & Q. Ry. Co. v. Merchants Nat'l Bank*, Gen. No. 6313. *Held*: (1) By the law of Illinois as it exists today (since the passage of the Negotiable Instruments Act of June 5, 1907) a bank is not liable in any case to the holder of a check drawn on it unless and until it accepts or certifies itself. (2) Under the Negotiable Instruments Act, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank and the bank is not liable to the holder unless and until it accepts or certifies the check. Affirmed. (CARNES, J.)

### Personal Injuries—Child Labor Act and Workmen's Compensation Act—Repeal by Implication.

70b. *Lostutter v. Brown Shoe Co.*, Gen. No. 6317. *Held*: The repeal of a statute by implication is not favored, and unless where two acts of the legislature come in question, they are clearly inconsistent with and repugnant to each other; or unless in the later statute, some express notice is taken of the former, plainly indicating an intention to repeal it, the later statute will not be considered as operating to repeal the former by implication. (2) No legislative intent is anywhere apparent in the provisions of the Workmen's Compensation Act, to repeal or abrogate any part of the provisions of the Child Labor Act; and the legitimate operation of the Workmen's Compensation Act does not necessarily interfere with the operation of the Child Labor Act; and there is therefore, no conflict between the two acts. The object and purpose for which each act was passed can be fully effectuated by allowing both acts to remain in full force. Reversed and remanded. (NIEHAUS, P. J.)

### Personal Injuries—Mines and Miners—Evidence—Expert Testimony.

71b. *Comorowski v. Spring Valley Coal Co.*, Gen. No. 6084. *Held*: (1) Where the condition in question is one of common observation, the testimony of so-called experts is not competent. (2) Whether or not the mine manager considers the condition in a mine dangerous is not the true criterion upon which to base the right of recovery \* \* \* the company should not be relieved from liability by the opinion of the mine examiner, that it was not a dangerous condition, if the jury finds as a matter of fact, from the evidence that the condition was dangerous. Affirmed. (NIEHAUS, P. J.)

OPINIONS FILED NOVEMBER 9, 1916.

### Affirmed on the Facts.

72b. *Voorhees v. Mason*, Gen. No. 6241-2. Affirmed on a review of the record. (CARNES, J.)

### Affirmed on the Facts.

73b. *Savio v. Vieno*, Gen. No. 6268. Affirmed on a review of the record. (DIBELL, J.)

IN THE THIRD DISTRICT

Opinions Digested by Student Editor Samuel Segal.

OPINIONS FILED JULY 10, 1916.

**Landlord and Tenant Act, Sec. 15—Statement of Account.**

1c. *Griffin v. Bonnett*, Gen. No. 6468. *Held*: (1) A grantee of a landlord, during the existence of a lease, is liable to a lessee for improvements made under such a covenant in a lease, where the covenant in the lease provided for improvements which are essential for the enjoyment of the property for the purpose for which it is leased. (2) Recovery should be limited to the amount claimed in statement of account. Judgment affirmed if enter remittitur of \$215 in five days, otherwise will be reversed and remanded. (THOMPSON, P. J.)

**Action for Injury to Support Under Dram Shop Act—Right of Jury to Consider Fact of Defendant Being a Saloonkeeper—Proof—Amount Necessary—Whether Means of Support Is Suitable to Condition Is Immaterial.**

2c. *Grove v. Link et al.*, Gen. No. 6500. *Held*: (1) In an action to recover damages for injury to means of support under Sec. 9 of the Dram Shop Act it is a material averment that defendant is a keeper of a dram shop and the jury has the right to consider evidence showing defendant is a saloonkeeper, and so it is error for the court to instruct that the jury is not to be influenced because of the fact that defendant runs a saloon. (2) Proof that as a result of intoxication caused by defendants, the husband squanders his money and that defendant suffered thereby in her means of support is sufficient to sustain a recovery. (3) If by reason of the intoxication of the husband he did not attend to his business and the wife was injured thereby in her means of support she may recover. (4) If the husband was receiving an income which should be applied to the support of himself and his wife, and this income through his intoxication caused by defendants was reduced and not applied to their support, then there is an injury to her means of support, and the question, whether her means of support were suitable to her condition in life is immaterial. Reversed and remanded. (THOMPSON, P. J.)

**Affirmed on the Facts.**

3c. *Columbia Graphophone Co. v. Niergarth*, Gen. No. 6505. Affirmed on a review of the record. (THOMPSON, P. J.)

**Affirmed on the Facts.**

4c. *McDermott v. Rex Electric Co.* Affirmed on a review of the record. (THOMPSON, P. J.)

**Bailments—Gratuitous Bailment—Degree of Care Necessary.**

5c. *Edwards v. Prust*, Gen. No. 6508. *Held*: (1) When a bailment is for the sole benefit of the bailee, the bailee is required to use extraordinary care over the thing bailed and is responsible for slight neglect. (2) When a gratuitous loan of a horse is shown and that the horse was sound, and was returned in an injured condition, it devolves upon the defendant to show he had exercised the degree of care required by the nature of the bailment, or the law would presume negligence. Reversed and remanded. (THOMPSON, P. J.)

**Reversed on the Facts.**

6c. *Elgin v. Elgin*, Gen. No. 6511. Reversed on a review of the record. (THOMPSON, P. J.)

## APPELLATE COURT DIGEST

### Resolutions Usually Recommendation and Not Contracts.

7c. *Handel v. Christian County*, Gen. No. 6514. *Held*: Where duties of officers are prescribed by statute they can not be changed by a resolution by a county board. (THOMPSON, P. J.)

### Reversed and Remanded on the Facts.

8c. *Todd v. Prudential Insurance Co.*, Gen. No. 6517. Reversed and remanded on a review of the record. (THOMPSON, P. J.)

### Affirmed on the Facts.

9c. *Crosier v. Crosier*, Gen. No. 6521. Affirmed on a review of the record. (THOMPSON, P. J.)

### Practice—Judgment Non Obstante Verdicto—Motion in Arrest of Judgment—Special Finding of Jury Not in Bill of Exceptions.

10c. *Tribune Co. v. Dunlap Mfg. Co.*, Gen. No. 6525. *Held*: (1) At common law a judgment *non obstante verdicto* could only be entered when the plea confessed the cause of action and set up matter in avoidance of the cause of action were, even if true, immaterial and did not constitute a defence to the action. In such a case the plaintiff is entitled to judgment notwithstanding a verdict for the defendant on the immaterial issue. (2) The motion to be made by the defendant for a judgment because of the insufficiency of plaintiff's pleadings is a motion in arrest of judgment. (3) Where the bill of exceptions does not show that there was any special finding by the jury, the fact that there be a variance between the special finding and the general verdict is not preserved for review. Affirmed. (THOMPSON, P. J.)

### Affirmed on the Facts.

11c. *The Russell & Co. v. Dunbar*, Gen. No. 6529. Affirmed on a review of the record. (THOMPSON, P. J.)

### Amendment of 1909 to Administration Act—Construction.

12c. *Estate of J. C. Hudson*, Gen. No. 6541. *Held*: When the award has been approved and the time for an appeal from the order of approval has expired and there is no fraud or mistake in its allowance, it is conclusive against the world as far as the personal estate is concerned. Reversed and remanded with direction. (THOMPSON, P. J.)

### Evidence—Reservation of Evidence Supporting a Defense Till Surrebuttal—Failure to Submit Interrogatories Not Necessarily Reversible Error—Should Object to Bad Instructions at Trial Court—Must Name Error.

13c. *Fink v. Arnstadt*, Gen. No. 6547. *Held*: (1) It is not error to exclude testimony offered in contradiction to a plaintiff concerning a conversation between defendant and plaintiff, in which it is claimed the plaintiff said he guaranteed the article he was selling. (2) It is not proper to reserve evidence that is cumulative of that offered in support of a defense and present it in surrebuttal. (3) Failure to submit interrogatories prepared by the court, to counsel before they are given to the jury does not necessarily constitute reversible error. Notice of substance is enough. (4) When counsel, upon inquiry, makes no objections to instructions submitted at the time, he should not be permitted to urge the giving of instructions as error in the upper court. (5) When counsel does not aid the court by indicating the alleged errors of the court below, the Appellate Court does not, on its own motion, seek for reasons to reverse a case. Affirmed. (THOMPSON, P. J.)

### Evidence—Burden of Proving a Defense of Confession and Avoidance Is on Defendant.

14c. *Burrell Engineering and Construction Co. v. Pekin Farmers' Grain Co.*, Gen. No. 6550. *Held*: The burden of a defense which admits and avoids

the cause of action is on the defendant, and so it is error to instruct the jury that as a matter of law the burden of proof is upon the plaintiff to prove its case by a preponderance of the evidence, and in case it is evenly balanced to find for the defendant. (THOMPSON, P. J.)

**Practice—Non-Compliance With Statute Is Ground for Demurrer to Plea.**

15c. *Bradshaw v. Sny Island Levee Drainage District*, Gen. No. 6561. *Held*: Where statute provides that a petition shall set forth plats and profiles of the work to be done, a demurrer will be sustained to a plea of justification that does not aver that the improvement erected was shown by plans and specifications, or mentioned in the petition filed. Affirmed. (THOMPSON, P. J.)

**Sec. 470 Hurd's R. S. 1913—Construction—School Funds May Not Be Used for Costs.**

16c. *Board of Education of Dist. No. 7, Green County v. School Directors of District No. 66, Macoupin County*, Gen. No. 6564. *Held*: (1) Sec. 470, Hurd's R. S., 1913, only makes a school district liable for the tuition of pupils attending high school in another district after the directors of the resident district have been requested to approve the selection by the parents of the high school district that the parents desire their children shall attend. (2) The school funds raised for educational purposes may not be used for the payment of costs. Reversed in part and affirmed in part. (THOMPSON, P. J.)

**Dram Shop Act—Degree of Intoxication.**

17c. *Horrighits v. Peter Troesch et al.*, Gen. No. 6569. *Held*: If the intoxication is such that in consequence of it plaintiff suffered damages to her means of support, the degree of intoxication, whether great or small, is sufficient to justify a recovery under the Dram Shop Act. Affirmed. (THOMPSON, P. J.)

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**Practice—Bill of Exceptions Not Signed by Judge—No Change of Venue on Judge's Own Motion—Instructions.**

18c. *Corbly v. Corbly et al.*, Gen. No. 6420. *Held*: (1) Where one presents a bill of exceptions within the time fixed for so doing to a judge legally qualified to pass upon and sign the same, he cannot be prejudiced by the neglect of the judge to whom it was presented. (2) There is no law by which a judge of a court of record can order a change of venue from himself to some other judge on his own motion, and the calling in of another judge to hear the case is in no sense a change of venue and does not disqualify the first judge from taking further action in the case. (3) The fact that a bill of exceptions is signed "County Clerk" instead of "Clerk of the County Court" does not stop the same from becoming part of the records of the County Court. (4) It is error for a court to instruct that if the jury believe that parties in the same store "entered into arrangements whereby they have advertised their goods jointly . . . for convenience or the saving of expense of advertising," then there was no partnership, because the "arrangements, etc.," may have been a partnership arrangement. Reversed and remanded. (GRAVES, J.)

**Statute of Limitations—When it Begins to Run as to Collections Made by One Tenant in Common.**

19c. *Wolkan v. Wolkan*, Gen. No. 6425. *Held*: Where one tenant in common collects rents and does not pay over the amount due to the other tenant in common the statute of limitation will not begin to run till there is a demand for an accounting and a refusal. Judgment reversed and cause remanded with directions. (ELDRIDGE, J.)



**Construction of Will—When Gift Takes Effect.**

20c. *Henderson et al. v. Cadwalde, et al.*, Gen. No. 6440. *Held*: Where a will directs that the real estate be sold after the death of the wife of the testator and certain proportion of the proceeds paid to certain person the said legacies become vested in said legatees at the death of the testator and if the legatees die before the death of the life tenant the said interests should be paid to the personal representatives of said deceased legatees. Decree affirmed. (THOMPSON, P. J.)

**Evidence—Construction of Sec. 3, Chap. 51, R. S.**

21c. *Carney, Adm'r v. Baker*, Gen. No. 6463. *Held*: Section 3, Chapter 51, R. S. is construed to mean that in all cases a party may testify to the extent necessary to admit his books of account in evidence notwithstanding that the adverse party may be suing or defending in one of the capacities mentioned in Section 2 of said Act. Reversed and Remanded. (ELDRIDGE, J.)

**Federal Liability Act—Assumption of Risk.**

22c. *Roberts v. C. C. C. & St. L. Ry. Co.*, Gen. No. 6481. *Held*: Where the question of assumption of risk arises under the Federal Liability Act the decisions of the state courts do not control and so an employe does not assume risks that are not necessarily, ordinarily or naturally incident to the occupation in which he is engaged until he becomes aware of the defect or neglect out of which the danger arises and the risk involved, unless both defect and risk are so obvious that an ordinarily prudent person would have observed and appreciated them. Affirmed. (GRAVES, J.)

**Laches—Not Invoked Where Other Party's Fraud Caused Restitution to Status Quo—Not Invoked Where Other's Fraud Makes it Impossible.**

23c. *Mount v. Norman*, Gen. No. 6485. *Held*: (1) The doctrine of laches cannot be invoked by one whose fraudulent concealment of the acts of his own fraud has kept his victim in ignorance thereof. (2) Likewise the doctrine, that there must be a restitution to the *status quo* before a rescission of the contract will be permitted, cannot be invoked by one whose fraud has put it out of the others power to so do. Judgment reversed and cause remanded with direction. (ELDRIDGE, J.)

**Practice—Recovery for Temporary Injuries Under Count Showing Permanent Injuries—Election to Sue for Temporary or Permanent Injuries Caused by Nuisance.**

24c. *Prather, et al Trustees v. City of Springfield*, Gen. No. 6486. *Held*: (1) Where a count has allegations of facts which show a permanent injury to land there may be no recovery for temporary injuries thereunder, unless there are such other allegations included so that taking the count as a whole it need not be construed as applying only to permanent injuries. (2) Where a nuisance consists of a construction of a permanent nature one has a right to treat the injuries occasioned thereby as permanent or temporary at their election. Affirmed. (ELDRIDGE, J.)

**Practice—Informality of Verdict.**

25c. *The People v. Hardy*, Gen. No. 6503. *Held*: When a verdict does substantial justice, informality should not vitiate it. Affirmed. (GRAVES, J.)

**Criminal Code—Paragraph 435 Not Applicable Where Judgment Requires Fine to be Worked Out.**

26c. *The People v. Haston*, Gen. No. 6504. *Held*: Paragraph 435 of the Criminal Code, requiring a court to discharge a person from further confinement when it is apparent to the court that the one confined for a fine or costs has no estate wherewith to pay the same, does not apply to a case where the judgment of the court required the defendant to work out the

fine in accordance with paragraph 168 of the Criminal Code. Affirmed (ELDRIDGE, J.)

**Practice—Complaint of Error Not Relating to Amount of Verdict Cannot Be Made by Successful Party to Suit.**

27c. *Casper v. Meyer*, Gen. No. 6506. *Held*: A party in whose favor a judgment is rendered cannot be heard to complain of errors of the court that do not relate to, or tend in any way to effect the amount of the verdict, but which relate solely to right to recover. Affirmed. (GRAVES, J.)

**Affirmed on the Facts.**

28c. *Wier v. Crandall*, Gen. No. 6507. Affirmed on a review of the record. (ELDRIDGE, J.)

**Reversed on the Facts.**

29c. *The People v. Seed*, Gen. No. 6509. Reversed on a review of the record. (GRAVES, J.)

**Reversed on the Facts.**

30c. *Smith v. Norris*, Gen. No. 6510. Reversed on a review of the record. (ELDRIDGE, J.)

**Evidence—Proof of a Meeting of Board of Directors, and Business Transacted.**

31c. *Roustan et al. v. Slater et al., School Directors*, Gen. No. 6512. *Held*: (1) The only way the fact can be established that a regular or a special meeting of a board of directors was held, or what, if any, business was transacted at any such meeting is by the record which statute requires shall be kept of such matters. (2) Where there is no proof in the record that a special election was called, what occurred at that time is a nullity and does not furnish any justification or authority for making changes in a school house site, to issue bonds, or build the proposed school house. Decree reversed and remanded with directions. (GRAVES, J.)

**Divorce—Desertion as a Cause—Living Apart by Agreement.**

32c. *Reams v. Reams*, Gen. No. 6515. *Held*: (1) Desertion in order to be a valid ground for divorce must not only be wilful and without reasonable cause in the beginning, but must continue so for the period of at least two years. (2) Living separate and apart by consent or by agreement will not constitute wilful desertion or entitle either party to a divorce on that ground. Decree affirmed. (GRAVES, J.)

**Contracts—Accord and Satisfaction—Consideration.**

33c. *Norton v. Order of United Commercial Travelers of America*, Gen. No. 6518. *Held*: Where it is admitted by both parties that a certain sum of money is due and that amount is paid and accepted in full of all liability there is no accord and satisfaction since there is no consideration to support it. Reversed and judgment here. (GRAVES, J.)

**Affirmed on the Facts.**

34c. *Latta v. The Granite Live Stock Ins. Co.*, Gen. No. 6519. Decree affirmed on a review of the record. (GRAVES, J.)

**Shot Firer's Act—Mere Negligence—Insufficient Instructions Applying to Common Law Courts Should Be So Limited—No Recovery on Negligence Not in the Declaration—Possibility of Injury.**

35c. *Hackl v. Tower Hill Coal Co.*, Gen. No. 6523. *Held*: (1) The proof of mere negligence unmixed with an intentional or conscious lack of obedience to the mandate of the legislature as expressed in the Shot Firers' Act would not give to appellee a right of action under either of the two

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counter charging willful violation of duty. (2) Where it is the intention to have an instruction relate only to such courts as charge common law negligence there should be apt words limiting it so that the meaning would be conveyed to the average mind. (3) An instruction is defective if it does not limit the right to recover to acts of negligence which are declared on in the declaration. (4) It is error to exclude a doctor's testimony as to what might possibly happen. Reversed and remanded. (GRAVES, J.)

### Common Carriers—Inherent Defect in Freight.

36c. *Libro v. C. C. C. & St. L. Ry. Co.*, Gen. No. 6524. *Held*: A common carrier is not liable for injuries caused to live stock by their own inherent lack of vitality and not through any fault or negligence of or the violation of any duty of the carrier. Reversed. (ELDRIDGE, J.)

### Quasi Contract—In Pari Delicto.

37c. *Newman v. Ross, Receiver*, Gen. No. 6526. *Held*: Where parties engage in an unlawful undertaking and are *in pari delicto* the law will not assist either, but will leave them in the situation in which they have placed themselves. Reversed with a finding of fact. (GRAVES, J.)

### Agency—Apparent Authority.

38c. *Bailey v. Walters*, Gen. No. 6527. *Held*: While a principal may be bound to the extent of the apparent authority, which he has conferred upon his agent by holding him out to the public as possessing such authority and thus causing others to believe that the agent has greater powers than those actually conferred, yet the acts which amount to such representation of the agents authority must be known to the party seeking to avail himself of them. Affirmed. (ELDRIDGE, J.)

### Parent and Child—Title by Adverse Possession—Necessity of Notice to Quit or Demand for Possession Before Suit.

39c. *Berry v. Virden, Con.*, Gen. No. 6528. *Held*: (1) Where the premises owned by a parent are occupied by his child by permission, in order to establish title by adverse possession there must be clear and positive proof of an open discussion of the title of the parent and the assertion of a hostile title by the child, and the knowledge of the assertion of such hostile title must be brought home to the parent and such hostile possession and assertion of title must be continued for 20 years thereafter. (2) No notice to quit or demand for possession is necessary before suit is brought where the relation of landlord and tenant does not exist or where the tenant repudiates the relationship and claims to be the owner in fee by advance possession. Reversed and remanded. (ELDRIDGE, J.)

### Practice—Service of Process Not Necessary When Party Is in Court—Bills and Notes—Presumption that One Is a Holder in Due Course.

40c. *Koult, Com. v. Canright, et al.*, Gen. No. 6530. *Held*: (1) A party who enters his general appearance in a case and makes a defense on the merits, thereby waives the issuance and service of process and is in court for all purposes. (2) Every holder of a negotiable instrument is presumed to be a holder in due course in the absence of evidence to the contrary, and in order that a purchaser of a negotiable instrument shall be deemed not to hold it in "due course" it must appear that he had actual knowledge of the infirmity or defect complained of, or knowledge of such facts that his action in taking the instrument amounts to bad faith. Affirmed. (GRAVES, J.)

### Evidence—Must Show Amount of Injury Caused by Elements in Declaration—View of Premises by Jury Not Evidence to be Considered—Physical Disturbance of Plaintiff's Land in Order to Recover.

41c. *Murray v. Vandalia R. R. Co.*, Gen. No. 6531. *Held*: (1) When witnesses do not say how much of the damages caused were caused by the

actionable elements of injury that are declared on, their evidence does not furnish a basis for the recovery of substantial damages, and such evidence should be excluded. (2) Where the jury is permitted to view the premises in question, by the consent of both parties, it is proper to instruct the jury, at the request of one party, that the view is not in evidence, but was only allowed for the purpose of helping the jury to understand the evidence detailed by witnesses, and the jury should not consider any fact bearing on the merits of the controversy derived from such view. (3) It is error for an instruction to omit the element of physical disturbance of a plaintiff's property by the things declared. Reversed and remanded. (THOMPSON, P. J.)

**Affirmed on the Facts.**

42c. *Bennett v. Bennett, Esq.*, Gen. No. 6532. Affirmed on a review of the record. (THOMPSON, P. J.)

**Affirmed on the Facts.**

43c. *Nutt v. Vennum*, Gen. No. 6534. Affirmed on a review of the record. (GRAVES, J.)

**Affirmed on the Facts.**

44c. *Weakly v. Misell*, Gen. No. 6535. Decree affirmed on a review of the record. (ELDRIDGE, J.)

**Insurance—Construction Against Insurer—Forfeiture Not Favored—Representations Must Be Known to Be Untrue.**

45c. *Bailey v. Fraternal Reserve Life Ass'n.*, Gen. No. 6537. *Held*: (1) All conditions and provisions in an insurance contract which have for their sole aim the purpose of defeating the object of the contract are strictly construed against the insurer. (2) Forfeitures of such contracts are not favored in law, and will never be declared if by any reasonable construction such result can be avoided. (3) Where questions are of such a character that it is beyond human probability that they can be answered with literal and absolute truth the court will not, if possible call the answers warranties. (4) If answers are representations and not warranties a plea should aver that the applicant knew the answers to be untrue at the time they were made. Affirmed. (ELDRIDGE, J.)

**Change of Residence of Insane Person—"Non-Resident" as Used in Lunacy Laws Construed.**

46c. *Parcher, Guard v. Reese*, Gen. No. 6538. *Held*: (1) While an insane person is conclusively presumed to be incapable of determining for himself where he will abide or hold his domicile, if he has a conservator or guardian, his domicile or residence may be changed by the direction or assent of such officer. (2) "Non-resident" as used in paragraph 41 of the lunacy laws of this state, should be construed to mean an insane person who is beyond the jurisdiction of the courts of this state and, who has been taken before the courts of such other state and adjudged to be insane and a guardian or conservator of his person and estate has been appointed by such court and in such cases the courts of this state should recognize the acts of such foreign courts as valid and the guardian or conservator appointed by them as the guardian or conservator of a non-resident lunatic. Affirmed. (GRAVES, J.)

**Evidence—Entries in Books of a Stranger—Not Reversible Where Shown by Other Competent Evidence—Good Faith No Defense Where One Speaks as of His Knowledge—Doubtful Constructions Are for the Jury to Determine.**

47c. *Nat'l Bk. of Pawnee v. Hamilton*, Gen. No. 6539. *Held*: (1) The entries in the books of a stranger to the litigation, can not be held to be binding on a litigant who has never had anything to do with them or

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the matters concerning which the entries are made. (2) Though it is error to admit such evidence the case will not be reversed where the facts sought to be established by the books were shown by other competent evidence which is not contradicted. (3) Good faith is no defense where the fraud and deceit practiced consists of making false statements of fact as of the knowledge of the one speaking, and if one makes a positive statement that a thing that is susceptible of knowledge is true, it is implied that he knows it to be true of his own knowledge and, if he has no such knowledge, he is guilty of actual fraud. (4) If a statement is of such a nature as to admit of being construed either as a statement of fact or the expression of an opinion, then, whether it was a statement of fact or of opinion would be a question of fact for a jury but where the statements are positive, the meaning of which can not be misunderstood and are shown to be false, it is a question of law for the court. Affirmed. (GRAVES, J.)

### **Legal Ethics—Representing Other Party After Discharge by First Party—Retaining Fee—Express Stipulation Unnecessary.**

48c. *O'Hair, et al, Partnen v. Watson*, Gen. No. 6540. *Held*: (1) While an attorney-at-law cannot accept employment from adverse litigants at the same time and in the same controversy, he may represent some other party in the litigation after the first litigant's interest in the matter had been supposedly concluded and the attorney discharged from performing any further services for him. (2) There need not be an express stipulation that a retaining fee is to be paid to support a recovery therefor. Affirmed. (ELDRIDGE, J.)

### **Reversed on the Facts.**

49c. *Blackner Post Pipe Co. v. Goodman, et al.*, Gen. No. 6543. Reversed and remanded on a review of the record. (ELDRIDGE, J.)

### **Reversed on the Facts.**

50c. *Duley v. Ill. Cent. R. Co.*, Gen. No. 6544. Reversed on a review of the record, with a finding of fact. (GRAVES, J.)

### **Practice—Instruction Directing Verdict Where There Is One Good Count—Continuance to Get Impeaching Witness.**

51c. *Johnson v. Chicago & Alton R. R. Co.*, Gen. No. 6545. *Held*: (1) It is not error to refuse an instruction directing a verdict when the declaration contains one good count and there is evidence sustaining the good count. (2) A continuance or postponement will not be granted for the purpose of obtaining a witness to impeach one who has testified. Affirmed. (THOMPSON, P. J.)

### **Evidence—Testimony of Wife—Continuing Contract—Statute of Limitations.**

52c. *Harding, et al, v. Mitchell*, Gen. No. 6546. *Held*: (1) Where a husband and wife are co-parties, each may testify in his or her own behalf, although the testimony may inure to the benefit of the other spouse; or against his or her own interest although the testimony may militate against the other spouse. (2) Where a contract is a continuing one the statute of limitations will not be a bar because the time has run since the contract was first entered into, but recovery may be had for all money which shall have accrued within five years prior to bringing of the suit. Reversed and remanded. (ELDRIDGE, J.)

### **Affirmed on the Facts.**

53c. *Graves, et al, v. T. P. & W. Ry. Co.*, Gen. No. 6447. Affirmed on a review of the record. (GRAVES, J.)

**Practice—Rules of Equity Jurisdiction Not Applied in Law Actions.**

54c. *Killion v. Modern Woodmen of America*, Gen. No. 6548. *Held*: In Illinois where the distinction between common law and equity jurisdiction is maintained, the courts of law dispose of law suits by the rules of the common law, which enforces a contrast as it is found to exist, and the equitable rule that looks upon that as done which should have been done cannot apply in actions at law. Affirmed. (GRAVES, J.)

**Practice—Execution Against Municipal Corporation.**

55c. *Howell v. City of Gillespie*, Gen. No. 6549. *Held*: It is reversible error, in rendering judgment against a municipal corporation to award an execution therefor against it. Judgment reversed and cause remanded with directions. Costs in this court to be taxed to appellee. (ELDRIDGE, J.)

**Principal and Agent—Agent's Misrepresentation.**

56c. *Gullett v. Leaverton*, Gen. No. 6551. *Held*: Misrepresentations of the agent, made when he is acting within the scope of his authority or when the principal has knowledge of the deceit will bind the principal. Affirmed. (GRAVES, J.)

**Reversed on the Facts.**

57c. *Brooks v. Laws*, Gen. No. 6552. Reversed on a review of the record with finding of fact. (ELDRIDGE, J.)

**Right of Foot Passenger on Street—Duplicate Instruction—Instruction Singling Out a Witness.**

58c. *Wortman v. Trott, et al.*, Gen. No. 6559. *Held*: (1) A foot passenger always has an equal right with vehicles to the use of all of that part of the streets used by the public travelling on foot in crossing the street. (2) It is not error to refuse a correct instruction if the proposition is included in another instruction. (3) An instruction singling out one witness and directing the jury how to weigh his testimony is bad. Affirmed. (GRAVES, J.)

**Evidence—Evidence of Transaction With Dead Agent.**

59c. *Scarlett v. Nat'l Live Stock Ins. Co.*, Gen. No. 6560. *Held*: Since the amendment to Sec. 4, Chap. 51 (Hurd's R. S. 1911) evidence is permissible of transactions between a party to the suit and the agent of the adverse party although the agent be dead. Affirmed (ELDRIDGE, J.)

**Affirmed on the Facts.**

50c. *The People v. Brown*, Gen. No. 6562. Affirmed on a review of the record. (GRAVES, J.)

**Public Highways—Vacation Must Be in Accord With Statute—Contract With Commissioners No Defense to Action for Obstruction.**

61c. *Town of Polk v. Ghent*, Gen. No. 6563. *Held*: (1) A public highway can only be vacated in the manner provided by statute and the commissioner of highways has no power to contract to close up an old highway and open a new one in exchange therefore. (2) No agreement or contract one may have made with the highway commissioners can be a defense to an action brought to recover a penalty for obstructing a public highway, no matter how innocent one may have acted in the matter. Affirmed. (ELDRIDGE, J.)

**Divorce—Jurisdiction Requisites—Must Appear by Evidence Certificate or by Specific Findings of Court.**

62c. *Harbauer v. Harbauer*, Gen. No. 6566. *Held*: In order that a court may have jurisdiction in a divorce case, the complainant must be an actual and bona fide resident of the county where he brings his suit and

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must have been a resident of the state for at least one year next before suit is begun, and there facts must appear affirmatively either by certificate of evidence or by specific findings in the decree. Reversed and remanded. (GRAVES, J.)

### Real Property—Delivery of Deed in Escrow—Effect of Statute of 1897 on Executors.

63c. *Estate of Blaine v. Blaine*, Gen. No. 6567. *Held*: (1) Where a grantor delivers deeds to a third person with written directions that the deeds are delivered in trust for the grantees, with a request that the deeds be held until the grantor's death and then be delivered to the grantees the effect is to retain for the grantor an estate for life and give the grantees the remainder. (2) The statute of 1897, allowing the executors or administrators of a life tenant to recover from an undertenant the proportion accruing before death, and the remainderman the residue, would make the executor account to the estate for the proportionate share of rents accrued at the time of the death of the grantor. Reversed and remanded with directions. (ELDRIDGE, J.)

### Affirmed on the Facts.

64c. *Imperial Seating Co., v. Bloomington Opera House*, Gen. No. 6573. Decree affirmed on a review of the record. (GRAVES, J.)

### Practice—No Right to Jury Under Sections 81 and 82 of Administration Act.

65c. *Estate of Baker v. Baker*, Gen. No. 6574. *Held*: It must now be conceded that the practice to compel an executor or administrator by citation to inventory and account for assets in his possession belonging to the estate of which he is executor or administrator by virtue of section 81 and 82 of the Administration Act, is proper procedure, that it is equitable in its nature and the parties are not entitled to a jury. Affirmed. (ELDRIDGE, J.)

### Trust Funds—Suretyship—Right of Subrogation No Defense That Surety Entered Into Ultra Vires Contract of Indemnity With a Bank.

66c. *English, et al, v. Palmer Nat'l Bk. of Danville, et al.*, Gen. No. 6575. *Held*: Where a bank permits the transfer of trust funds to the individual account of trustee, knowing that the same is a misappropriation of the funds and sureties of the trustee have made good a default of the trustee the sureties will be subrogated to the rights of the obligee in the bond against the bank which received said trust funds with notice of their misappropriation. (2) Where a surety has entered into an ultra vires contract with a bank (banks not being able to become sureties or guarantees) that the bank reimburse the surety in case of loss, this is of no concern to the defendant bank which received trust funds with notice of misappropriation. Affirmed. (THOMPSON, P. J.)

### Jurisdiction—When Question May Be Raised.

67c. *Van Gorder, et al, v. Saybrook State Bk.*, Gen. No. 6576. *Held*: It is no answer to the challenge in this court that the trial court was without jurisdiction to say the point was not raised in that court. Whenever the want of jurisdiction is discovered courts will proceed no further with the litigation. Reversed with directions. (GRAVES, J.)

### Contracts—Payment of Interest Not Stated—Statute of Frauds—Where Signature Must Be—Signature Written by Another—Kind of Writing Necessary.

68c. *De Vares v. Corea*, Gen. No. 6577. *Held*: (1) Interest cannot be read in to a contract where there is no provision therefore unless there is a statute authorizing it. (2) To take a contract out of the statute of

frauds it is not necessary that the signatures of the parties shall be attached to the bottom thereof unless the statute provides that they shall be "subscribed thereto." (3) Where one directs another to write his name it takes the case out of the statute. (4) Any kind of writing containing on their face or by reference to others, the names of the parties, a sufficient description of the property to render it capable of being identified, together with the terms and conditions of the agreement is sufficient to take the case out of the Statute of Frauds. Reversed. (ELDRIDGE, J.)

**Evidence—Admission of Transcript of Judgment of a Foreign State Against Executors as Evidence Against the Estate in Illinois.**

69c. *Barber v. Keiser et al, Executors*, Gen. No. 6578. *Held*: (1) When an executor has prosecuted a suit in a foreign state and the defendant in the foreign state, in a cross action, has recovered a judgment against the executor in the suit prosecuted by the executor the courts of this state can not allow such judgment as a claim against the estate in Illinois upon the filing of a transcript as such a judgment is not even *prima facie* evidence of indebtedness. (2) Though a testator directs his executors to prosecute a suit begun by him in a foreign state, yet to have rendered the judgment of any vaudity against the estate of the deceased, the executors should be required to take out ancillary letters in the foreign state. Affirmed. (THOMPSON, P. J.)

**Instructions—Must Not Assume Facts.**

70c. *Lowery v. Ashton*, Gen. No. 6579. *Held*: (1) It is error to instruct the jury "You have a right to take into consideration his health prior to the assault complained of and his health since the assault, if shown by such evidence, and allow him such sum as you may believe from the evidence will compensate him for any such injuries," because it assumes the assault was made and appellee was damaged and authorizes the jury to estimate damages in the light of a comparison of his health before and after the assault regardless of whether the change was due to the assault or not. (2) It is error to instruct "You may take into consideration that plaintiff was again struck by the defendant, while he, the defendant, was not acting in self defense," because it assumes the fact that defendant struck plaintiff again, and not in self defense. Reversed and remanded. (GRAVES, J.)

**Pleading Variance—Must Be Pointed Out.**

71c. *McBride v. Assumption Telephone Co.*, Gen. No. 6580. *Held*: In order to object to a variance between the declaration and the proof it must be pointed out specifically at the trial. Affirmed. (ELDRIDGE, J.)

**Affirmed on the Facts.**

72c. *Wottawa v. Ridgely*, Gen. No. 6581. Affirmed on a review of the record. (THOMPSON, P. J.)

IN THE FOURTH DISTRICT

Opinions Digested by Student Editor John L. Turnbull.

OPINION FILED MAY 4, 1916.

**Reversed on the Facts.**

1d. *Thomas v. Dodge*, Gen. No. 26. Reversed on a review of the record. (BOGGS, J.)

OPINIONS FILED NOVEMBER 13, 1916.

**Reversed on the Facts.**

2d. *La Salle Extension University v. Stelle*, Gen. No. 7. Reversed on a review of the record. (MCBRIDE, J.)



## APPELLATE COURT DIGEST

**Highways—Lawful Character Unaffected by Fact That It May Cause Damage to Adjacent Land—Effect of Construction by Third Person—Streams—When May Be Lawfully Diverted.**

3d. *Swigert v. C. B. & Q. R. R. Co.*, Gen. No. 8. *Held*: (1) The lawful character of a levee or road, or the lawful right of commissioners to make and maintain it is not affected by the fact that its original construction or its future maintenance, may or will occasion damages to an adjacent land owner. (2) Where a railroad constructs a road or levee, control, repair and improvement of which is vested in County commissioners by statute, under arrangements made with said Commissioners, the public character of the work is not changed. (3) Where one purchases land in a bottom where there is a river or creek, such land is purchased with risk of overflow, and a railroad company cannot be made to pay for such overflow and washing, simply because said company may have made a new channel for such creek or river on its right of way, if such channel conveys the water into the old channel before it leaves the right of way of the company, and such new channel affords equal or better means for the escape of water than the old channel and brings no more land over plaintiff's lands, than would have flown thereon in a state of nature. *Reversed*. (McBRIDE, J.)

**Practice—Judgment Nunc Pro Tunc—When Allowable—Modes of Rendering Judgment—Rights of One Unlawfully Deprived of Public Office—Nature of Action of Assumpsit for Money Had and Received.**

4d. *McManus v. Nellis*, Gen. No. 9. *Held*: (1) If a judgment has been rendered and the clerk fails to enter it as directed a court is justified in requiring the clerk to carry out the order that was in fact entered altho the term of office of the judge making such order has expired. (2) Excepting the rendering of judgments by confession and agreement, there are two modes of rendering judgments recognized by our courts. One is to pronounce judgment in open court which it then becomes the duty of the clerk to enter upon the records. Another mode is the one provided by statute where a judge takes a case under advisement and his decision in vacation may be entered of record in vacation. (3) Where one is elected to an office and another without his consent deprives him of that office and collects the fees and emoluments of that office, under such state of facts the party entitled to the office could sue the party depriving him thereof and recover the fees and salary collected. (4) In an action of assumpsit for money had and received the main inquiry is whether the defendant holds money which ex aequo et bono belongs to the plaintiff. The burden is upon plaintiff to prove that the defendant holds money which in justice belongs to the plaintiff. The action approaches nearer to a bill in equity than any other common law action. *Reversed*. (McBRIDE, J.)

**Bills and Notes—To Whom Payment Must Be Made—Practice—Improper Remarks by Counsel—When Question Based Thereon Cannot Be Raised—What Constitutes an Improper Remark—Instructions—Knowledge by Jury of Legal Terms in Common Use May Be Presumed.**

5d. *King v. Heilig*, Gen. No. 12. *Held*: (1) It is the duty of the maker of a note to see that any moneys paid by him upon the note are paid to the proper holder thereof. (2) Where counsel makes improper remarks to which no exception is preserved, the question cannot be considered by a court of review. (3) A remark by counsel in his opening statement to the jury that after hearing the evidence, their verdict will surely be the same as that given in the case by a former jury is improper. (4) While it may be well to explain to the jury what a bona fide holder means, yet such terms are so commonly used that the jury could not be misled by them. *Reversed*. (McBRIDE, J.)

**Pleading—Effect of Withdrawal of Special Counts in a Declaration—Bills and Notes—Time Within Which Holder of Draft must Present for Payment—Distinction Between a Bill and a Check—Duties of Holder of a Check—How Excuse for Non-Presentation Must Be Pleaded.**

6d. *Simonoff v. Granite City National Bank*, Gen. No. 25. *Held*: (1) Where a plaintiff files the common counts and two special counts one of which is voluntarily withdrawn and to the other a demurrer is sustained, the plaintiff must show his right of recovery on the common counts because the special counts are thereby out of the case. (2) All drafts whether foreign or inland bills, in order to charge the drawer, must be presented to the drawee within a reasonable time, and in case of non-payment notice must be given promptly to the drawer, otherwise the delay will be at the peril of the holder. (3) Whether or not an instrument is a bill of exchange, so called, or a check, depends on its character, rather than what it may be designated on its face. (4) Section 185 of the Negotiable Instruments Law requires the holders of checks to present the instrument for payment to the drawee within a reasonable time after issuance and notice of dishonor given to the drawer as in the case of bills of exchange or the holder must show some valid reason for non-presentation or that his failure to present same has caused no damage to the drawer. (5) In order for a plaintiff to recover on a theory that it was not necessary for him to present bills of exchange to the drawee for payment, he must do so under a special count, alleging the reasons for such failure, as under the common counts evidence under this theory would not be proper. *Reversed.* (Boggs, J.)

**Bailments—Degree of Care Required to Be Exercised by Borrower of Chattels—Duty to Insure.**

7d. *Parker v. Dietz*, Gen. No. 16. *Held*: (1) It is the duty of a bailee to use the utmost care and diligence to preserve the particular property which he has borrowed, and if he fails or neglects to do any act that he could have done for the preservation of the property, then he is liable for such neglect and the liability is based upon his negligence in this respect. (2) There is no duty devolving upon the borrower of a chattel even for accommodation to insure such chattel for the benefit of the owner, unless there is a contract so to do or a custom existing that requires it. (3) Even under a gratuitous loan for use, the borrower does not insure the safety of the goods and he is not liable for them where he keeps and uses them with care and in the manner permitted by the terms of the loan, he is not liable where the chattel dies or is stolen or is destroyed without negligence on his part. The risk of losses like these abide with the owner unless the bailee has failed in his duty to anticipate and guard against the danger. *Reversed.* (McBRIDE, J.)

**Practice—Effect of Failure to File Brief by Appellee As Required by Rule of Court.**

8d. *January v. Metropolitan Life Ins. Co.*, Gen. No. 22. *Held*: Where it appears from the record and files that the appellee has failed to file any brief in the case as required by the rules of the Appellate Court, judgment of the lower court will be reversed *pro forma* as provided may be done under rule 27. *Reversed.* (McBRIDE, J.)

**Tort—Alienation of Affections—When Evidence of Divorce Decree Is Admissible—Practice—Instructions to Jury.**

9d. *Diesel v. Diesel*, Gen. No. 27. *Held*: (1) In an action for the alienation of affections of the wife, evidence of a decree of divorce granted to the wife at her instance on the ground of extreme and repeated cruelty inflicted by the husband is competent as tending to show that the affections of the wife had been alienated by the plaintiff's own conduct. (2) The law requires the jury to determine the liability of a defendant from the evidence

and from that alone, and an instruction which would permit them to enter into an open field of investigation, cannot be sustained. Reversed. (HIGBEE, P. J.)

**Practice—Who May Grant Appeal—What Constitutes a Sufficient Certificate of Evidence.**

10d. *Anderson, Admx. v. Chittick*, Gen. No. 28. *Held*: When a judge has rendered a decree, another judge at the same term may permit an appeal from that decree and enter an order to that effect. (2) Where the certificate of evidence contains the certificate and signature of the judge, the mere fact that the court reporter also signed it, does not serve to invalidate it. Reversed. (Mc BRIDE, J.)

**Practice—Nature of Action Under Ordinance for Collection of Penalty.**

11d. *Village of New Athens v. Casperson*, Gen. No. 30. *Held*: (1) In a civil action governed by the rules of civil procedure, a jury alone can determine the amount of the penalty. (2) A proceeding to collect a penalty for the violation of a town ordinance is a civil suit, in form, debt, and governed in all respects by the rules of procedure in civil cases. Reversed. (HIGBEE, P. J.)

**Practice—When Verdict of Jury Will Be Set Aside.**

12d. *Dallas v. East St. Louis & Suburban Ry. Co.*, Gen. No. 32. *Held*: While it is the duty of a court of review to sustain the verdict of a jury where it can reasonably be done, but where the courts of appeal upon the consideration of the testimony find that the verdict of the jury is greatly against the weight of the evidence, then it becomes the duty of such appellate court to reverse the judgment of the trial court. Reversed. (McBRIDE, J.)

**Practice—Power of Justice to Open or Amend Judgment—When Appeal Must Be Taken—Effect of Failure to Apply for Appeal Within Time Prescribed by Statute.**

13d. *Skimutis v. American Citizens' Lithuanian Club*, Gen. No. 33. *Held*: (1) After a justice enters a judgment, he has no authority to open, amend, or add thereto and any addition he may attempt to make at a later date, must be considered of no effect. (2) A judgment cannot be appealed from until it has been rendered and is in existence. (3) Where the appeal from a justice is not applied for in the time prescribed by statute, a court can acquire no jurisdiction of the case and can enter no order in it except to dismiss the appeal for want of jurisdiction. Reversed. (HIGBEE, P. J.)

**Practice—When Court May Limit Number of Witnesses.**

14d. *Town of Grand Prairie v. Schneider*, Gen. No. 34. *Held*: Where a large number of witnesses have been offered upon a question concerning which there is no controversy, or which appears to have been so fully proven that there can be no further doubt concerning it, it is proper for the court to limit the number of witnesses in order to avoid unnecessary expense and the consumption of unnecessary time. But where there is a fact asserted on the one side and denied on the other, and in case one side had a considerable preponderance in its favor, that fact might influence the jury in its behalf, in such case a limitation as to the number of witnesses on such facts is improper. Reversed. (HIGBEE, P. J.)

**Bills and Notes—Liability of Accommodation Maker.**

15d. *Bone Gap Banking Co. v. Porter*, Gen. No. 38. *Held*: Where accommodation paper gets into the hands of a holder in due course for value, the makers thereof are liable although the said note passed into the hands of such holder after maturity and with notice to the holder that it was accommodation paper. Reversed. (BOGGS, J.)

**Reversed on the Facts.**

16d. *Parrish v Bainam*, Gen. No. 39. Reversed on a review of the record. (HIGBEE, P. J.)

**Liens—Railroad Lien Act Construed—Who May Bring Action for—Practice—Findings of Master Conclusive When Not Excepted to.**

17d. *Angerer v. Southern Traction Co.*, Gen. No. 41. *Held*: (1) Before the sub-contractors are entitled to a lien under the railroad lien law, they must establish by the evidence that something was due to the general contractors. (2) A lien cannot be assigned in law so as to enable the assignee to maintain a suit thereon in his own name. (3) A lien may be enforced in a court of equity where the suit is carried on in the name of the original lien holder for the use of a third party. (4) Where the findings of a master are not excepted to in the trial court, such findings cannot be complained of in a court of review. (5) Where an amended bill claiming for extra materials is not filed for more than three months after the lien has accrued, the lien holder would not be entitled to a lien for such extras, for the reason that as to them, said amended petition set forth a new cause of action. Reversed. (BOGGS, J.)

**Practice—Who Are Effected by Result of Collateral Proceedings.**

18d. *Watson v. Kammeir*, Gen. No. 48. *Held*: (1) A party litigant shall not be affected by the result of proceedings to which he is a stranger. (2) In order to be bound by proceedings the party must have been directly interested in the subject matter of the proceeding with the right to make defense, to introduce testimony, to cross examine the witnesses on the opposite side, to control in some degree at least the proceedings and to have the right to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause. Reversed. (BOGGS, J.)

**Doctrine of Lateral Support Defined—Extent of Right—Right to Collect and Throw Water Back Upon a Servient Estate.**

19d. *Young v. C. C. C. & St. L. Ry. Co.*, Gen. No. 50. *Held*: (1) Anyone excavating on his own premises, must not excavate so close to the land of an adjoining neighbor as to cause earth from the land of such adjoining owner to cave or fall into the excavation, for lack of lateral support so far as its own weight is concerned. (2) A person excavating is not bound to furnish lateral support for additional weight which may be placed on the premises of the adjoining owner. (3) The owner of the dominant heritage has a right to collect the waters falling on his land and throw them on the land of the servient heritage in increasing quantities, and is not liable for damages caused thereby, providing the waters are thrown on to the servient heritage at a point where in the course of nature, they originally flow. Reversed. (BOGGS, J.)

**Mortgages—Release—Effect of Recording—Who May Release—Purchaser for Value—What Constitutes Notice—Purpose of Record.**

20d. *Bier v. Wieler*, Gen. No. 53. *Held*: (1) The recording of a release made by person appointed in a mortgage or trust deed to execute the release, carries with it as to subsequent bona fide purchasers, the legal inference that the released deed has been delivered. (2) The trustee in a trust deed has the power as to third parties to release the lien created thereby so as to revest the title in the grantor, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure and in violation of the obligations of his trust, and such a release may be made even though the indebtedness secured by the trust deed is not due at the time the release is executed. (3) In equity, a release unauthorized by the terms of the trust deed, or by the consent of the *cestui que* trust will have no effect upon the trust deed as between the original parties or as to subsequent purchasers with notice. (4) In order to constitute notice there

must be something more than bare suspicion; it must appear that such facts were suggested as would cause a prudent mind to investigate, and to fail to do so would constitute gross negligence on his part and that such neglect would be of a character that would imply a fraudulent intent. (5) The recording laws are designed to afford protection to parties acting in good faith and relying upon them, and in the absence of any notice or ground of suspicion, it is not the duty of a purchaser to obtain an admission of payment from the holder of a note secured by a trust deed regularly released of record. Reversed. (McBRIDE, J.)

**Negligence—Proof of Notice of Defective Condition of Streets Essential to Support a Judgment Against a Municipality.**

21d. *Gage v. City of Vienna*, Gen. No. 54. *Held*: Notice of the condition of the streets upon the part of the city and of the fact that it is obstructed or out of repair is one of the essential elements to be proven, and in directing a verdict, the instruction must contain the element of notice, either actual or constructive. Reversed. (McBRIDE, J.)

**Practice—How Errors of Law Must Be Preserved Where Cause Is Tried Without Intervention of a Jury—Execution in Hands of Officers at Time of Transfer of Property and Writ of Attachment Sworn Out After Transfer, Distinguished—Bulk Sales Act Construed.**

22d. *Herschi v. Albrecht & Co.*, Gen. No. 56. *Held*: (1) In a cause tried before the court without the intervention of a jury, the parties may obtain from the court rulings upon written propositions of law submitted to it, and thereby preserve in the record, for the purpose of review, any erroneous view of the law, or erroneous application of the law to the facts of the case, by the trial court and unless questions of law or mixed questions of law and fact, are thus preserved, the record will present no questions for an appellate court, other than such as are raised by the admission or exclusion of evidence, or incidentally otherwise, during the progress of the proceedings. (2) The distinction must be borne in mind between an execution in the hands of an officer at the time of the transfer of property in which case the debtor must claim his exemptions according to the statute in order to hold them and a writ of attachment sworn out after transfer, because in the latter case no lien ever attaches unless the transfer was fraudulent, regardless of the amount of property. (3) Where a bill of sale purporting to convey a stock of merchandise recites a consideration greater than the statutory exemption, in a writ under a writ of attachment sued out after the transfer, evidence of the actual value of the tangible property conveyed should be admissible because part of the consideration named may have been intangible assets such as the acquisition of the favorable location to carry on the business together with the good will. Reversed. (HIGBER, P. J.)

**Joint Estates in Personal Property—Statute of 1821 Construed—Effect of Intention to Hold Jointly—Conveyancing Act Construed.**

23d. *In the Matter of the Estate of Nelson A. Grote, Deceased*, Gen. No. 58. *Held*: (1) The Statute of 1821 abolishing joint estates operated to abolish the right of survivorship in personal as well as real estate. (2) Notwithstanding it may have been the intention of the depositors of a joint account, that the funds should be held jointly, with the right of survivorship, it would still, under the provisions of the Statute of 1821, be held in common, and the right of survivorship would not obtain. (3) The Act on Conveyances has reference only to real estate and in no way affects personal property held in joint ownership, so that the Statute of 1821 abolishing the right of survivorship as to such property still obtains. Reversed. (BOGGS, J.)

**Mortgages—Who Are Parties to Foreclosure Suit—Corporations—Services by Officer—When Presumed Gratuitous—Practice—Duty to Dismiss Bill as to Parties Proving No Interest in Subject Matter of Foreclosure Proceedings.**

24d. *Union Trust and Savings Bank v. Hall*, Gen. No. 59. *Held*: (1)

It is a general rule, not without exception, that all parties having an interest in the property, should be made parties to a proceeding foreclosing the same. It is essentially desirable that this rule should be adhered to in cases where the rights of parties claiming an interest in the property, are undetermined and the subject of dispute, and where additional litigation might become necessary to determine the conflicting claims. (2) When officers of a corporation act as solicitors for the same, the presumption must be, in the absence of a by-law or resolution employing them and providing for their compensation, that the services are gratuitous. The fact that only one member of the law firm to which an allowance of solicitor's fees has been made is an officer of the corporation does not affect the rule. (3) Where it appears from the proofs that a party-defendant in a foreclosure suit has no interest in the subject matter, refusal to dismiss the bill as to him is error. Reversed. (HIGBEE, P. J.)

**Bills and Notes—Promissory Notes—Alterations.**

25d. *Giffin v. Hart*, Gen. No. 62. *Held*: (1) The law indulges no presumption as to when a change in a written instrument was made, but requires the party offering an altered instrument in evidence, to explain such alteration satisfactorily to the court, before the instrument will be admitted in evidence. Such explanation may satisfactorily appear from the instrument itself or it may be made by extrinsic evidence. Reversed. (MCBRIDE, J.)

**Carriers—Interstate Shipments—How Governed—Reasonableness of Proviso in Shipper's Contract—Right to Determine Vested With Commission—Purpose of Interstate Commerce Commission.**

26d. *Keasler v. B. & O. S. W. R. R. Co.*, Gen. No. 65. *Held*: (1) Interstate shipments are governed by the provisions of the Interstate Commerce Act, including the amendments thereto. (2) Whether or not a provision with regard to the giving of notice of loss is reasonable is a question for the Interstate Commerce Commission, and so long as the filed tariff provides for a notice of this character, it is binding upon the shipper as well as the carrier, and cannot be questioned in a suit for damages. (3) The whole theory of the Interstate Commerce Commission is that contracts for interstate shipments must be uniform and must be binding on all shippers and carriers alike and so long as the tariffs filed with the Interstate Commerce Commission stand, they are not to be disregarded by either shipper or carrier, but are to be uniformly enforced. Not to do so in particular cases would amount to discrimination and would be a violation of the provisions of said act, and the courts are not warranted in countenancing any other than a uniform enforcement of its provisions until changed by the Interstate Commerce Commission under the provisions of said Interstate Commerce Act. Reversed. (BOGGS, J.)

**Practice—Cause of Action Defined—Necessary Elements of Cause of Action—Pleading—Essential Allegations—Aider by Verdict—Necessary Allegations in Actions to Recover for Personal Injuries—Where Allegation of Failure to Give Notice Is Fatal—Workmen's Compensation Act—Presumption Arising Where There Is No Reference to Act.**

27d. *Means v. Terminal R. R. Assoc. of Illinois*, Gen. No. 66. *Held*: (1) A cause of action includes not only a right of recovery, but also a right to bring the action to recover. (2) Although a plaintiff may have a meritorious cause of complaint, if such cause is stated in a court not having jurisdiction to give the relief prayed for or hear the case, it cannot be well said a cause of action has been stated in that court, as there is an absence of a right to recover in such court. (3) Where a court has jurisdiction to grant the relief sought for, there must be a statement which constitutes a cause of action entitling the party bringing the suit, to maintain an action in that

court. (4) Where the declaration fails to show that the plaintiff has a cause of action even after verdict, there is no room for intendment or presumption. (5) If a declaration omits to allege any substantial fact which is essential to a right of action and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. (6) A declaration in an action to recover for injuries received through negligence which does not aver due care on the part of the plaintiff when he was injured, and does not contain any averment in regard to his conduct or the circumstances surrounding him from which due care on his part may be reasonably inferred, does not state a cause of action, and, after the period of limitation fixed by the statute has elapsed, cannot be amended to state a cause of action not subject to the bar of the statute. (7) Notice which is required by law to be given city officials, is a part of the action and its omission is fatal and can neither be implied and cured by verdict or cured by amendment after verdict, because no cause of action exists unless notice is served. (8) In an action for personal injuries to an employe where there is no reference to the Workmen's Compensation Act, the legal presumption is that the injured employe was under the provisions of the act, and the plaintiff has no right to enforce suit at common law and a verdict would not cure or alter the legal presumption and consequently a recovery at common law could not be supported because by the terms of the statute no cause of action was stated. Reversed. (HIGBEE, P. J.)

**Practice—Instructions Held Erroneous—Elements to Be Considered by Jury in Estimating Damage for Loss of Support.**

28d. *Threlkeld v. Norwodowski*, Gen. No. 67. *Held*: (1) Failure to restrict the damages to the amount as shown by the proof is erroneous. (2) An instruction which names as an element to be considered by the jury in estimating loss of support the probable expectancy of the life of the deceased but contains no reference to the probable expectancy of the life of the plaintiff is erroneous. Reversed. (HIGBEE, J.)

**Insurance—How Risks May Be Transferred by Mutual Associations—Insurance Statute Construed—Practice—Procedure Upon Dismissal of Bill for Want of Equity.**

29d. *Goodall v. Cook*, Gen. No. 70. *Held*: (1) It requires a two-thirds vote of all the members, after notice, to transfer the risks of a mutual insurance company to some other company, and the reinsurance contract must be submitted to the meeting and include all the members. (2) The provisions of the statute (Section 245, Chapter 73, Hurd's Revised Statutes, 1913) with reference to the transfer of members or risks in a mutual association enters into and becomes a part of the contract of transfer just the same as the provisions of the statute were written into the Articles of Transfer. (3) When a bill is dismissed for want of equity, the court ordinarily makes no findings of fact other than to find the equities with the defendant. Reversed. (Boggs, J.)

**Mandamus—What Will Operate as a Defense to Mandamus to Levy Tax—Nature of Statute Providing for Manner of Payments of Judgments Against County—Nature of Writ of Mandamus—Duties of Tax-Levying Power.**

30d. *Halliday v. Board of County Commissioners*, Gen. No. 76. *Held*: (1) Where the judgment creditors of a county seek a mandamus to require the county to levy a tax for the payment of their judgments, if the county is seeking to justify its conduct upon the ground that it will require all the revenue that can be raised by taxation to pay the ordinary and current expenses of the county, then it should show definitely that such would be a necessity and it should appear from the testimony that the county was not levying a tax for one purpose and using the money to pay other indebtedness that had no greater right to be paid than the judgments in the petition.

(2) It is the duty of the board of county commissioners to show that it was actuated by an honest purpose to pay its legal obligations, and the statute of 1905 (Sec. 34 of Chap. 34, Hurd's R. S.) was enacted to enable the board to take care of such claims as had been reduced to judgment. This statute is mandatory and requires the board, when it comes to the question of determining the amount of taxes to be raised for county purposes to include judgments which have been obtained against the county. (3) While the issuing of the writ of mandamus is not a writ of right, but can only be issued in the discretion of the court, yet this is and must be a judicial discretion exercised when the interests of the parties involved require it. (4) A tax levying power cannot make provision for the payment of one debt or one class of claims and refuse to make any provision whatever for the payment of others, even those reduced to judgment. Reversed. (McBRIDE, J.)

Reversed on the Facts.

31d. *Woods & Boyd v. Tamper & Cook*, Gen. No. 77. Reversed on a review of the record. (McBRIDE, J.)

**Negligence—Attractive Nuisances—Scope of Doctrine—Defined—Trespasses, Duty Owed Toward—Practice—Improper Questions on Voir Dire.**

32d. *Purcell v. Degenhardt*, Gen. No. 80. *Held*: (1) The application of the doctrine of attractive nuisance seems to be more particularly made to such places, machines and appliances as are not at the time of the injury being used or supervised by those sought to be charged with negligence. (2) If the owner or occupant of premises leaves a dangerous machine or thing exposed under such conditions that it may reasonably be anticipated that children of such tender age as to be incapable of exercising proper care for their safety may, by their own instincts, be attracted to the dangerous thing and thereby injured, he will be liable. (3) Machines and vehicles in actual use at the time of the injury are not ordinarily recognized as attractive nuisances and the doctrine does not, consequently, apply to such machines or vehicles. (4) The owner or occupier of premises owes no duty to a trespasser except to do him no wilful or wanton injury. He is under no greater obligation to anticipate the presence of children upon his premises than of adults. This rule applies with the same force to the owner of a piece of machinery. (5) Where the case is not in fact being defended by an insurance or casualty company, questioning prospective jurors whether or not they are interested in any insurance or casualty company, doing liability business, is improper. Reversed. (HIGBEE, P. J.)

**Negligence—Damages—Proof Necessary When Plaintiffs Are Lineal Heirs of Deceased—How to Be Measured—Practice—Instructions—How to Be Construed.**

33d. *Holliday and Townsberry v. O'Gara Cold Co.*, Gen. No. 4. *Held*: (1) Where the plaintiffs are the lineal heirs of the deceased, upon proof of death by reason of the negligence of the defendant, the law presumes pecuniary loss and substantial damages to such lineal heirs. An entirely different rule prevails where the next of kin are lineal and where they are collateral. In the latter case, they must prove they were in the habit of receiving pecuniary assistance from the deceased, or they could only recover nominal damages. (2) The question of damages is exceedingly difficult of admeasurement and must therefore be left largely to the judgment of the jury. (3) Instructions must be considered as a series. Affirmed. (McBRIDE, J.)

**Practice—Weight to Be Attached to Finding of Court Where Jury Is Waived—Sales—When a Bill of Sale Becomes Unnecessary—Practice—Effect of Failure to Argue Assignment of Error in Brief—When Admission of Incompetent Evidence Will Not Be Ground for Reversal.**

34d. *Rosenfeld v. Ehrhart*, Gen. No. 5. *Held*: (1) Where a jury has been waived, the finding of the trial judge is entitled to the same weight as



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the finding of a jury on the controverted question of fact and unless said finding is against the manifest weight of the evidence, it will not be disturbed by a court of review. (2) A bill of sale is not necessary to pass the title to personal property and if in fact the possession of the goods is delivered, it makes no difference that the transaction is not evidenced by a bill of sale. Actual delivery of possession of personal property is usually of itself sufficient evidence of an intention to affect a sale thereof. (3) Where an assignment of error is not argued in plaintiff in error's brief by the rules of the court is thereby waived. (4) Even though the trial court may have admitted incompetent evidence on the hearing, yet if there be sufficient competent evidence in the record to sustain the court's finding and judgment, the judgment should not be disturbed on that account. Affirmed. (Boggs, J.)

### **Bills and Notes—Rights to Require Surrender of Evidence of Indebtedness Upon Tender of Payment.**

35d. *Eggert, Jr. v. Sexton*, Gen. No. 6. *Held*: Under the Negotiable Instruments Act, a debtor has a right to require that the interest coupons or other evidence of indebtedness be produced to him before he makes payment. Affirmed. (HIGBEE, P. J.)

### **Evidence—Record Required to Be Kept by Statute, Competent—Practice—Effect of Confirmation of Master's Report by Chancellor.**

36d. *Perks & Higgins v. Tippet*, Gen. No. 10. *Held*: (1) Where an execution docket is required under the law to be kept, it is competent evidence tending to show whether or not a controverted execution was in fact issued. (2) Where the evidence is conflicting and the chancellor has confirmed the findings of the master, an appellate court will not disturb the decree unless it is clearly and manifestly against the weight of the evidence. Affirmed. (Boggs, J.)

### **Practice—Procedure When Time for Filing Falls on Sunday—Equitable Jurisdiction of Probate Courts.**

37d. *Hayden v. Hargan*, Gen. No. 11. *Held*: (1) When the last day of the period fixed by the trial court for filing an appeal bond or bill of exception falls on Sunday, the bond or bill filed the following day is in apt time. (2) Probate courts and Circuit courts on appeal, in probate matters, have the right to exercise equitable jurisdiction in the settlement of estates when necessary to further the ends of justice and it is only in extraordinary cases that courts of equity will supersede the probate court in making such settlement. Affirmed. (HIGBEE, P. J.)

### **Agency—How Proven—When a Duty to Make Inquiries as to Real Authority of an Agent Arises.**

38d. *Nulsen v. Terre Haute Brewing Co.*, Gen. No. 13. *Held*: (1) Agency cannot be proven by the declarations of the agent himself. (2) Where an agent is in fact only a special agent and the person dealing with him has notice of such facts as to put him on inquiry as to the authority of such agent, a failure to make inquiry and ascertain the real authority of such agent is done at peril. Affirmed. (McBRIDE, J.)

### **Practice—Effect of Failure to File Bill of Exceptions.**

39d. *Bluff v. Kohl*, Gen. No. 14. *Held*: (1) Where there is no bill of exceptions contained in the record showing a motion for a continuance and the affidavit in support thereof, an appellate court is powerless to consider the action of the lower court in not allowing the said motion. Affirmed. (Boggs, J.)

### **Mortgages—Rights of Redeeming Creditor—Effect of Acceptance by Sheriff of a Lesser Sum Than Amount Due to Redeem—Effect of Issuance of Certificate of Redemption by Sheriff—Method of Construing Statute Covering Redemption from Judgment or Foreclosure Sales—Writ of Assistance Defined.**

40d. *Porter v. Citizens' Nat'l Bank*, Gen. No. 15. *Held*: (1) A judg-

ment creditor who redeems from a foreclosure sale and who causes a resale of said premises and becomes a purchaser thereof on such resale succeeds to all the rights in said property held by the original purchaser and is entitled to a writ of assistance to be placed in possession thereof. (2) Where a judgment creditor who seeks to redeem from a foreclosure sale by inadvertence deposits with the sheriff a slightly less sum than the amount actually due to the holder of the premises, but signifies his willingness to pay any balance that might be owing and in fact tenders an amount to cover such deficiency, sufficient has been done and the redemption should not be held void on that account. (3) The statute makes the sheriff the proper officer through whom to redeem where a resale of the premises is sought under an execution in his hands and unless some fraud is shown, the action of the sheriff issuing a certificate of redemption should be held valid and binding. (4) Statute covering redemptions from judgment or foreclosure sales should be liberally construed in order that the debtor's property may reach as far as possible. (5) A writ of assistance is a summary proceeding. Its object is to put into possession of premises, a person who has purchased at judicial sale under a decree in chancery. It will only issue against a party to the suit, or one who has come into possession *pendente lite*. The interests of other persons will not be adjudicated in this summary manner. Affirmed. (BOGGS, J.)

**Practice—Judgment on Information and Verdict Distinguished—Evidence—What Constitutes Prima Facie Evidence of Sale of Liquor in Anti-Saloon Territory—How Such Fact May Be Proved—When Party Is Not in a Position to Complain of Improper Exclusion of Evidence.**

41d. *People v. Belins*, Gen. No. 17. *Held*: (1) While the judgment of a county court in a prosecution although based on different counts of an information is a unit and must be reversed in whole or affirmed in whole in the appellate court, yet the verdict of a jury is not a unit to the same extent, and the court below, before judgment is entered, may arrest judgment as to any one or more of the counts. (2) While the issuance of a special tax stamp by the Federal government is prima facie evidence of the sale of liquors in anti-saloon territory, yet such fact must be proved by the original stamp itself, or an examined copy of the records of the district where the same is issued. (3) Where in a prosecution for the sale of liquor in anti-saloon territory, demand is made upon the defendant to produce a special revenue stamp claimed to have been issued to him by the Federal government, and upon his failure to do so the contents of an examined copy are read, the defendant is not in a position to complain that the examined copy itself was not placed in evidence when it was excluded by objection of his counsel that it would encumber the record by duplication of evidence. Affirmed. (HIGBEE, P. J.)

**Evidence—Sufficiency of Certified Copy.**

42d. *Volin v. St. Louis & O'Fallon Coal Co.*, Gen. No. 18. *Held*: An omission in a certificate that the clerk certifying is the legal keeper of the records is immaterial where the statutes, of which the court takes judicial notice, makes him such. Affirmed. (MCBRIDE.)

# ILLINOIS APPELLATE COURT CASES

## MONTHLY DIGEST

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## IN THE FIRST DISTRICT

Opinions Digested by Student Editors, Turnbull, Breyer, Carson,  
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OPINIONS FILED DECEMBER 19, 1916.

**Tort—Personal Injury—Wilful and Wanton Acts—Fact of the Accident as Evidence, Alone, of Negligence—Effect of Instruction Requiring "Ordinary Care, Prudence, Vigilance and Caution."**

537a. *Gordon, Adm., v. Stadelman*, Gen. No. 21816. *Held*: (1) Proof of prompt action on the part of a defendant when he becomes aware of the danger to plaintiff justifies the court in taking the question of wanton and wilful conduct away from the jury, for it is inconsistent with a general intent to inflict an injury or negligence of such a high degree as would be deemed equivalent to a wilful or wanton act. (2) An instruction to the jury that the fact of the accident alone is not evidence of negligence on the part of defendant, although it directs a jury's attention to a single item of evidence is not sufficient ground for a reversal. (3) An instruction requiring proof that a plaintiff was free from want of "ordinary care, prudence, vigilance and caution for his own safety" contains the superfluous words "prudence, vigilance and caution," but taken together with other instructions, stating that deceased was bound only to exercise ordinary care, does not justify a reversal. Affirmed. (BARNES, P. J.)

**Practice—Imprisonment of Insolvent Debtor—Statement of Claim—Showing of Malice.**

538a. *In re Petition of Meinhardt, ex rel Anderson*. Gen. No. 2187. *Held*: In a petition as an insolvent debtor for release from imprisonment on an execution in an action in the Municipal Court of Chicago in which the insolvent debtor claims that malice was not of the gist of the action resulting in his commitment, if the former judgment was not by default, it is insufficient to show that the statement of claim in which the *capias ad satisfaciendum* issued does not disclose that malice was the gist of the action; for the evidence introduced may have justified it. Affirmed. (BARNES, P. J.)

**Bailment—Evidence of Bailor's Assignee's Right.**

539a. *Hanecy v. Page*, Gen. No. 21824. *Held*: Where it is necessary for a pledgee of stock to show that he had not knowledge of the rights of a subsequent assignee of the pledgor, evidence of a conversation prior to the pledge between the pledgee and pledgor relative to assignee's interest in the stock is admissible, although plaintiff assignee was not present. Reversed and Remanded. (McDONALD, J.)

OPINIONS FILED DECEMBER 27, 1916.

**Statute of Limitations—Effect of Payment in Reviving Debt Barred by the Statute—Effect of Bill of Particulars Filed in Circuit Court in Appeal from Justice of the Peace Court on Claims Barred by the Statute.**

540a. *Spieker v. Schonfeld*, Gen. No. 20130. *Held*: (1) A payment will not revive a claim barred by the Statute of Limitations, unless there is an actual affirmative intention shown on the part of the debtor to make payment on the debt which is claimed to be due. (2) The addition of bill of particulars of claims barred by the Statute at time of filing of bill of particulars will not prevent the operation of the statute, as, the proceeding in the Circuit Court being *de novo*, the question of whether or not the Statute has run is determined by computing the time that has elapsed between the accrual of the additional causes of action and the time they were brought into the suit by the bill of particulars. Reversed and judgment here. (GOODWIN, J.)

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**Practice—Involuntary Nonsuit.**

541a. *Kennedy v. City of Chicago*, Gen. No. 21262. *Held*: Where the evidence introduced by a plaintiff lacks all the essential elements necessary to prove his right to recover, the court may cause a nonsuit to be entered in the cause, and a nonsuit so entered is involuntary. Affirmed. (GOODWIN, J.)

**Affirmed on the Facts.**

542a. *Reliance Elevator Co. v. Zimmer*, Gen. No. 21305. Affirmed on a review of the record. (GOODWIN, J.)

**Affirmed on the Facts.**

543a. *Malmquist v. Belden Manufacturing Co.*, Gen. No. 21378. Affirmed on a review of the record. (GOODWIN, J.)

**Procedure—Reversal of Judgment as Against Weight of Evidence.**

544a. *Tarjan v. Regelin*, Gen. No. 21390. *Held*: A judgment will not be disturbed unless it is against the manifest weight of the evidence. Affirmed. (GOODWIN, J.)

**Insurance—Necessity of Returning Consideration Upon Cancellation of Policy.**

545a. *Young v. Union Life Insurance Co.*, Gen. No. 21399. *Held*: Where a contract of insurance is voidable at the option of the insurer, cancellation by him is in the nature of a rescission and requires for its consummation both a notice of an election to terminate *in praesenti* and a relinquishment of the consideration. Affirmed. (TAYLOR, J.)

**Reversed on the Facts.**

546a. *Morris v. Hankel Printing Co.*, Gen. No. 21429. Reversed and cause dismissed on a review of the record. (TAYLOR, J.)

**Affirmed on the Facts.**

547a. *Cochran Lumber Co. v. Consolidated Adjustment Co.*, Gen. No. 21479. Affirmed on a review of the record. (TAYLOR, J.)

**Contracts—Accord and Satisfaction—Settlement of a Disputed Claim—Retention of Check by Creditor.**

548a. *Levinstein v. Dalton*, Gen. No. 21487. *Held*: (1) Where the amount of debt is ascertained and not in dispute, payment by the debtor and acceptance by the creditor of a less sum will not operate as a satisfaction of the demand; but if the amount is unliquidated or there is a bona fide dispute as to how much is due, the payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor, is a satisfaction of the claim. (2) Where a creditor retains a check tendered as payment in full it is an acceptance of the check with the conditions attaching thereto, although the creditor protests at the time that it is not all that is due him. (3) An account is unliquidated, although the items are not in dispute, if the evidence shows there was a controversy over a set-off, and the balance due was fairly in dispute. Reversed. (O'CONNOR, P. J.)

**Corporations—Personal Liability of Officers Where Incorporation Has Not Been Properly Recorded.**

549a. *American Laundry Machinery Co. v. Channels*, Gen. No. 21529. *Held*: Any person or persons being or pretending to be directors or officers of a corporation or a pretended corporation are jointly and severally liable for the debts contracted in the name of such corporation or pretended corporation where the certificate of incorporation has not been recorded in the county where its principal office is located, and this too, although some of them did not personally participate in the transaction. Reversed and Remanded. (O'CONNOR, P. J.)

**Contracts—Waiver of Strict Performance in Mutual Benefit Association Policies—Procedure—Service Upon a Voluntary Association—Estoppel from Denying Incorporation.**

550a. *Dugan v. International Ass'n. of Bridge and Structural Iron Workers*, Gen. No. 21537. *Held*: (1) Failure on the part of a member of a mutual benefit association to comply with the provisions of a by-law requiring prompt payment of assessments may be waived by customary acceptance at any time, so that the failure of a member to comply strictly with such regulation will not work a forfeiture of his rights. (2) Where an association assumes a name implying corporate existence and has an organization consisting of a president, secretary, and other officers, a constitution and by-laws, and a common seal, for purposes of service, it may be estopped to deny that it is a corporation. (3) Where the members of a voluntary association are numerous and it is impracticable to bring all before the court, service upon a part, who act for other members of the association as well as themselves, will be a sufficient service upon the whole. *Affirmed.* (O'CONNOR, P. J.)

**Reversed on the Facts.**

551a. *Krell v. Meyer*, Gen. No. 21546. *Reversed* on a review of the record. *Reversed and judgment here.* (O'CONNOR, P. J.)

OPINIONS FILED DECEMBER 30, 1916.

**Affirmed on the Facts.**

552a. *Schippersky v. Gartner*, Gen. No. 21857. *Affirmed* on a review of the record. (BARNES, P. J.)

**Affirmed on the Facts.**

553a. *Chinpek v. Northwestern Yeast Co.*, Gen. No. 21872. *Affirmed* on a review of the record. (McDONALD, J.)

**Confession of Judgment—Motion to Vacate—Landlord and Tenant—Rent Accruing After Death of Landlord.**

554a. *Furman v. Wiczorkowski*, Gen. No. 21930. *Held*: (1) Where a defendant, by his attorney in fact, duly authorized, confesses judgment and releases all errors, an appeal or writ of error will not lie to review the judgment itself, but will lie to review the overruling of a motion to vacate the judgment. (2) A motion to vacate a judgment entered by confession is addressed to the sound legal discretion of the trial court, whose action in denying it will not be reviewed unless it appears it has been abused. (3) The wrongful act of a landlord does not debar him from a recovery of rent unless the tenant by such act has been deprived in whole or in part of the possession either actually or constructively, or the premises rendered useless. (4) Rent accruing after the death of the owner of the demised premises is a chattel real and goes to the heir or devisee of said deceased owner, and not to his administrator or executor. *Affirmed.* (McGOORTHY, J.)

**Bills and Notes—Consideration.**

555a. *Steward v. Weisenmayer*, Gen. No. 21947. *Held*: Where there are several makers on a promissory note, it is not necessary that the consideration should pass to all from the payee of the note. If there is a valuable consideration given from some of the makers to the others, or from anyone else by reason of which they executed the note, the consideration is sufficient to sustain it. *Affirmed.* (BARNES, P. J.)

**Suretyship—Construction of Conditions Precedent in Contracts of Guaranty.**

556a. *Goldenberg v. Myers*, Gen. No. 21963. *Held*: (1) A guarantor may invoke a strict construction of his contract of guaranty and where a written notice within ten days of default of party whose performance is guaranteed is made a condition precedent to liability, guarantor may be

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discharged if plaintiff does not prove that notice was actually received, as well as mailed, within the stipulated time. Reversed. (BARNES, P. J.)

### **Workmen's Compensation Act—Finality of Judgment of the Industrial Board.**

557a. *Struple v. Bishop*, Gen. No. 21944. *Held*: Paragraph (f) of section 19 of the Workmen's Compensation Act makes the decision of the Industrial Board, in the absence of fraud, if it acts within its powers, conclusive upon the courts. It is not within the province of the courts to pass upon the weight or sufficiency of evidence in a proceeding of this kind, but to determine if there is *any* competent or legal evidence to support the decision of the Industrial Board. Affirmed. (McGOORRY, J.)

### **Practice—Motion to Vacate—Effect of Withdrawal.**

558a. *Chicago Daily News Co. v. Jackson*, Gen. No. 21994. *Held*: Where a party withdraws his motion to vacate a judgment grounded upon irregular procedure in setting time of trial, which is apparently about to be granted, he impliedly assents to the judgment and cannot later renew his motion. Affirmed. (BARNES, P. J.)

### **Affirmed on the Facts.**

559a. *Village of La Grange v. Indiana Harbor Belt R. R. Co.*, Gen. No. 22009. Affirmed on review of the record. (BARNES, P. J.)

OPINIONS FILED JANUARY 8, 1917.

### **Pleading—City Ordinance—Civil Service Commission—Finality of Its Finding of Guilt.**

560a. *People ex rel. Qualey v. City of Chicago*, Gen. No. 21989. *Held*: (1) In a petition for reinstatement in office, petitioner must set out the city ordinance creating the office. (2) This court cannot review the findings of the Civil Service Commission upon the questions of the innocence or guilt of a petitioner. Reversed and remanded with directions. (McSURELY, P. J.)

### **Reversed on the Facts.**

561a. *Kelly v. Great Lakes D. & D. Co.*, Gen. No. 22262. Reversed on a review of the record and judgment of *nil capiat* and for costs entered here. (HOLDOM, J.)

### **Attachment—Compliance with Statute.**

562a. *Newport v. McPherson*, Gen. No. 22482. *Held*: Attachment proceedings are purely statutory and are in their nature drastic. To take advantage of such an extraordinary remedy the statutory provisions must be in their essence at least strictly complied with. Such compliance must appear from the record; no presumptions not deducible from matters appearing of record can be indulged. A case of affirmative compliance with the statute must appear from the record; less will not suffice. Reversed and remanded with directions. (HOLDOM, J.)

### **Statute of Limitations—Statement of Claim.**

563a. *Lillis v. City of Chicago*, Gen. No. 22502. *Held*: Where the first statement of claim contains an imperfect statement of a cause of action, and the second statement states the same actionable cause with more particularly, the second statement does not state a new cause of action and the Statute of Limitations will not run. Affirmed. (McSURELY, P. J.)

### **Landlord and Tenant—Premises Used in Common by Tenants Are Under Control of Landlord—Practice—Necessity of Appearance of Exceptions in Bill of Exceptions to Be Availed of on Review—Abatement of Personal Action Against Deceased's Estate by the Death of Deceased's Personal Representative—Pleading—**

**Effect of Plea of General Issue in Admitting Ownership of the Property—Evidence—Hypothetical Case.**

564a. *Sprengel v. Schroeder*, Gen. No. 22505. *Held*: (1) Although exceptions are found in the record they may not be availed of upon review, unless they are preserved in the bill of exceptions. (2) That portion of the premises which is used in common by tenants remains in the control of the landlord and it is his duty to keep it in reasonably safe condition. (3) In an action for damages for personal injury due to a defect in premises of defendant, the plea of the general issue admits ownership and control. (4) An averment that plaintiff "received severe bodily injuries, internal, external, permanent and otherwise, which have from that time and will for the rest of her life disable her from attending to her affairs and business" is sufficiently broad to include any bodily injury of whatever character resulting from the accident, including that of a fracture of the femur. (5) A party seeking the opinion of an expert may, within reasonable limits, put his hypothetical case as he claims it has been proven and take the opinion of the witness thereon, leaving the jury to determine whether the case, as put, is the one proven. (6) It is not reversible error to instruct a jury that the plaintiff is entitled to recover if they find defendant guilty of the negligence "charged in the declaration" where the jury was also told as a condition precedent to a finding against defendant, that they must find that the plaintiff was at and prior to the time of the accident in the exercise of due care for his own safety. (7) Although there is no statutory provision for the substitution of a personal representative upon the death of one originally appointed such substitution has the same force and effect as the original appointment and a personal action against deceased does not abate upon the death of his original personal representative. Affirmed. (HOLDOM, J.)

**Reversed on the Facts.**

565a. *F. Mayer Boot & Shoe Co. v. Grygierszyk*, Gen. No. 22507. *Held*: Reversed and judgment here on a review of the record. (McSURELY, P. J.)

**Contracts—Accord and Satisfaction—Joint Debtors.**

566a. *Good Products Co. v. Dwyer*, Gen. No. 22511. *Held*: Satisfaction of a debt by one of two joint debtors discharges the obligation of both regardless of the knowledge of or participation in such settlement by the other debtor. Reversed and judgment of nil capiat and for costs. (HOLDOM, J.)

**Pleading—Construction of Pleadings After Judgment—Negligence—Remoteness of Damage.**

567a. *Jackson v. Burns*, Gen. No. 22512. *Held*: (1) If the issue joined on trial is such as necessarily requires proof of the facts so defectively or imperfectly stated or omitted, such defect, whether in substance or in form, is cured by the verdict. (2) Where the negligence of a defendant in driving his automobile causes the automobile of a third person to collide with the automobile of the plaintiff, the resulting damage to the automobile of the plaintiff is not too remote. Affirmed. (McSURELY, P. J.)

**Procedure—Errors—Appeal—Failure to File Written Motion—Vacation of Judgment.**

568a. *Donovan v. National Life Insurance Co.*, Gen. No. 22515. *Held*: (1) An omission to file a written motion is an error of procedure, and can in no case be considered an error of fact. (2) An order vacating a judgment after the term at which it is entered, is void. Reversed. (HOLDOM, J.)

**Corporations, Statute on—(Chapter 33 Hurd, Sec. 4)—Capital Paid in Property.**

569a. *Sherman v. Hayes*, Gen. No. 22516. *Held*: A contract whereby the parties attempt by dictum to fix the value of intangible property is repugnant to the statute and void. Affirmed. (McSURELY, P. J.)



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### **Affirmed on the Facts.**

570a. *Marshall v. D. L. & W. R. R. Co.*, Gen. No. 22525. Affirmed on a review of the record. (HOLDOM, J.)

### **Affirmed on the Facts.**

571a. *Rosetti v. C. R. I. & P. Ry. Co.*, Gen. No. 22528. Affirmed on a review of the record. (McSURELY, P. J.)

### **Bailment—Presumption of Lack of Care from the Fact of Loss.**

572a. *Schaefer v. Washington Safety Deposit Co.*, Gen. No. 22531. *Held*: A proprietor of a safety deposit vault is bound as bailee to exercise just ordinary care for the preservation of the property entrusted to it and there is no presumption of lack of care from the fact of loss. Reversed with finding of fact. (HOLDOM, J.)

### **Practice—Ordinance of City of Chicago—Judicial Notice of.**

573a. *City of Chicago v. Smith*, Gen. No. 22532. *Held*: This court cannot take judicial notice of an ordinance of the city of Chicago. Affirmed. (McSURELY, P. J.)

### **Practice—Ordinance of City of Chicago—Judicial Notice of.**

574a. *City of Chicago v. Jones*, Gen. No. 22533. *Held*: This court cannot take judicial notice of an ordinance of the city of Chicago. Affirmed. (McSURELY, P. J.)

### **Procedure—Statement of Claim in Suit for Malicious Prosecution—Effect of Defective Statement of Claim on Default of Defendant.**

575a. *Rutkowski v. Marcowska*, Gen. No. 22542. *Held*: (1) In a suit for malicious prosecution, the statement of claim must allege the want of probable cause and the termination of the original proceedings in favor of the now plaintiff. (2) Where a statement of claim does not show any liability against defendant, he is not bound to answer, and hence cannot be in default. Reversed and judgment here. (McSURELY, P. J.)

### **Affirmed on the Facts.**

576a. *Rosenbluth v. Heintz Food Co.*, Gen. No. 22545. Affirmed on a review of the record. (HOLDOM, J.)

### **Practice—Bill of Exceptions—Completeness.**

577a. *De Long v. Hruby*, Gen. No. 22563. *Held*: A judgment will not be disturbed if there is not a complete bill of exceptions before this court. Affirmed. (McSURELY, P. J.)

### **Garnishment Act—Wages Earned After Service of the Writ.**

578a. *Fuller v. Bridgeport Wood Finishing Co.*, Gen. No. 22565. *Held*: Under section 14 of the Garnishment Act as amended in 1901, an employer is not required to answer for wages earned by a wage earner after the service of the writ. Reversed and remanded with directions. (HOLDOM, J.)

OPINION FILED JANUARY 15, 1917.

### **Practice—Municipal Court, First Class Cases—Certificate of Evidence.**

579a. *Weingarden v. Weinberg*, Gen. No. 22728. *Held*: (1) The making of a certificate that the record contains all the evidence is a judicial act, which must be performed by the judge. (2) Without a bill of exceptions, certificate of evidence, or stenographic report, certifying that it contains all the evidence heard upon the trial in a first-class case in the Municipal Court, unless such record is a praecipe record, a court of review will presume that the judgment is sustained by the evidence heard upon the trial, and such judgment will not be disturbed upon review for errors of fact. Affirmed. (HOLDOM, J.)

OPINIONS FILED JANUARY 17, 1917.

**Reversed on the Facts.**

580a. *Weiss v. Corn*, Gen. No. 21275. Reversed and judgment here on a review of the record. (TAYLOR, J.)

**Accord and Satisfaction—Payment of Sum Less Than the One Due.**

581a. *Kieszkowski v. Bostrom*, Gen. No. 21371. *Held*: It is undoubtedly the rule that a payment of a lesser sum will not discharge a debt of a greater sum, without some additional compensation. Yet it is also well settled that where the creditor receives anything of benefit to himself, that he would not otherwise have had, together with the payment of a lesser sum, there may be an accord and satisfaction. Reversed and remanded. (GOODWIN, J.)

**Bills and Notes—Negotiation After Maturity—Evidence—Parol Agreement Varying Terms of a Negotiable Instrument.**

582a. *Clinton v. Royal*, Gen. No. 21474. *Held*: (1) where a payee negotiates a note after maturity, his indorsee is subject to all defenses pleadable against him. (2) Evidence of a parol agreement varying the terms of a negotiable instrument is inadmissible. Reversed and remanded. (GOODWIN, J.)

**Affirmed on the Facts.**

583a. *Corrigan v. North American Union*, Gen. No. 21490. Affirmed on a review of the record. (GOODWIN, J.)

**Contracts—Burden of Proof of Payment.**

584a. *Peter Schoenhofen Brewing Co. v. Newbold*, Gen. No. 21702. *Held*: Where a defendant admits receipt of goods and the price claimed by plaintiff, and interposes as a defense that payment has been made, proof of non-payment by the plaintiff is unnecessary to establish a cause of action, but the burden of proving payment is upon the defendant. Reversed and remanded. (O'CONNOR, J.)

**Reversed on the Facts.**

585a. *Chicago v. Moser*, Gen. No. 21707. Reversed on a review of the record. (GOODWIN, J.)

**Dram Shop Act—Subsequent Intoxication—Abusive Attitude Toward Family.**

586a. *Gustafson v. Peterson*, Gen. No. 21431. *Held*: (1) In an action under section 9 of the Dram Shop Act for damage to means of support, evidence of husband's intoxication subsequent to times defendant was alleged to have sold him liquor is admissible to show a resulting habitual drunkenness causing loss of support. (2) In such an action evidence of abusive attitude toward family is admissible, not show damage through injury to feelings, but to show the nature and extent of the intoxication. Affirmed. (GOODWIN, J.)

**Damages—Breach of Warranty—Pleading—Variance.**

587a. *Brian v. Born Packers' Supply Co.*, Gen. No. 21538. *Held*: (1) The measure of damages for a breach of warranty is the difference between the value of the goods as warranted and the actual value in their defective condition. (2) For a judgment to stand on appeal, the statement of claim, the evidence, the instructions and the verdict must be at least reasonably consistent and must tend to support it. Reversed and remanded. (TAYLOR, J.)

**Contracts—Defense of Illegality—Practice—Confession of Judgment.**

588a. *Hudson v. Marks*, Gen. No. 21553. *Held*: (1) It is a defense to an action on a lease that it was made for an illegal or immoral purpose, but if not made with such purpose it is not a defense that lessor subsequently knew of it and accepted rent with such knowledge. (2) The action of a court

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in refusing to set aside a judgment by confession will not be reviewed unless the affidavit upon which it is based sets up facts which if true would in themselves (without inference) constitute a defense. Affirmed. (GOODWIN, J.)

### Contracts—Substantial Performance.

589a. *Bushnell v. Chester*, Gen. No. 21573. *Held*: A slight or partial neglect on the part of one of the parties to a contract to observe some of the terms or conditions thereof will not justify the other party to at once abandon the agreement. Affirmed. (O'CONNOR, P. J.)

### Common Carriers—Connecting Carriers—Duty to Accept Goods from Initial Carrier.

590a. *Crane v. Taff*, Gen. No. 21580. *Held*: (1) While an initial carrier entrusted and charged with the duty of forwarding goods to their destination has express authority to forward them over the route named in the bill of lading, it is also within the scope of its authority to make changes in that route if the facts and circumstances are such as to make it necessary, and the question of whether the original route shall be followed or another selected is one between the shipper and the original carrier. (2) Where goods are tendered to a connecting carrier by a carrier in possession, it is clearly its duty to accept them and carry them on to their destination, and it is not justified in refusing so to do until express authority to make the change in the route is shown, or until evidence is heard on the question of the initial carrier's right to change the route. Reversed and remanded. (GOODWIN, J.)

### Wages—Evidence.

591a. *Alford v. Lambert*, Gen. No. 21592. *Held*: Where one is suing to recover wages, the amount of work which he performed for the defendant is admissible in evidence to determine whether or not a contract for the payment of wages existed. Reversed and remanded. (GOODWIN, J.)

### Affirmed on the Facts.

592a. *Nelson v. McKeown*, Gen. No. 21600. Affirmed on a review of the record. (O'CONNOR, P. J.)

### Bills and Notes—Failure to Present Check Within Reasonable Time—New Promises to Pay.

593a. *Forler v. Butts*, Gen. No. 21622. *Held*: (1) Where the failure of the payee of a check to present the check for payment within a reasonable time results in a loss to the maker of the check, it constitutes a payment or extinguishment of the debt for which the checks are drawn. (2) Unless it appears that the new promise is made with a full knowledge of the facts out of which the discharge of the drawer has arisen, such promise is no waiver. Affirmed. (GOODWIN, J.)

### Affirmed on the Facts.

594a. *Chicago Builders' Specialties Co. v. Koehring Machine Co.*, Gen. No. 21645. Affirmed on a review of the record. (O'CONNOR, P. J.)

### Affirmed on the Facts.

595a. *Childs & Co. v. City of Chicago*, Gen. No. 22991. Affirmed on a review of the record. (O'CONNOR, P. J.)

## IN THE FOURTH DISTRICT

Opinions Digested by Student Editor Paul E. Price.

**Pleading—Necessary Allegations in Actions for Negligence—Negligence—Nature of Duty to Furnish Safe Premises—Effect of Election Not to Come Within Workmen's Compensation Act.**

43d. *Sanboenf v. Murphy Construction Co.*, Gen. No. 23. *Held*: In drawing a declaration charging negligence, it is not necessary, even if it is

proper, to allege alone a duty on the part of defendant to do certain things, but facts must be alleged from which the law will raise a presumption of such duty. (2) The duty to exercise reasonable care to see that the place furnished for a servant to work is reasonably safe is a positive obligation toward the servant and the master is responsible for any failure to discharge that duty, whether he undertakes its performance personally or through another servant. (3) Where an employer has elected not to come within the provisions of the Workmen's Compensation Act, in an action by servant for injuries, instructions relating to the question whether or not the servant was guilty of negligence on his part are properly refused. Instructions upon the question of assumption of risk are likewise improper. Affirmed. (HIGBEE, P. J.)

**Practice—When Judgment May Be Amended Subsequent to Term—When Rendered—Presumption That Court Will Not Enter a Judgment Against a Person of Whom it Has No Jurisdiction.**

44d. *Fries v. Stephens*, Gen. No. 24. *Held*: (1) To justify an amendment of a judgment at a subsequent term, the error must be shown by some note or memorandum from the records or quasi-records of the court, or by the judge's minutes, or some entry in some book required to be kept by law or papers on file in the case, and cannot be determined from the memory of a witness or recollection of a judge himself. (2) It is to be presumed that a court will not enter a judgment against a person of whom it has no jurisdiction by service or otherwise. Affirmed. (HIGBEE, P. J.)

**Practice—Instructions—Duty to Point Out Manner in Which Appellant Was Injured—Duty to Follow Rules of Court in Preparation of Abstract.**

45d. *Monk v. Caseyville Ry. Co.*, Gen. No. 29. *Held*: (1) Where counsel have not pointed out in what particular an instruction complained of could have injured him and unless he was so injured, the giving of the instruction should not be held as a ground for reversing the case. (2) Counsel in preparing an abstract should be careful to follow the rules of court as it causes great inconvenience when this is not done, and warrants an affirmation of a judgment under the rules without a consideration of the case on its merits. Affirmed. (BOGGS, J.)

**Mining Statute Construed—Effect of Possession of Certificate from Mine Examining Board—Pleading—Misjoinder—How Question Must Be Preserved—Vice-Principal and Master Properly Joined—Scope of Mining Statute—Practice—What Will Be Sufficient to Sustain a Judgment.**

46d. *Wendzenski v. Madison Coal Corporation*, Gen. No. 35. *Held*: (1) Where a willful violation of the provisions of the mining statute with reference to the duties of mine manager, is charged in the declaration, the defenses of contributory negligence or assumed risk are available to either the coal company or to its mine manager. (2) The provisions of the Mining Statute relating to the duty of the mine manager with reference to the giving instructions concerning the handling of explosives and the placing and blasting of shots should be construed to the effect that unless a miner is a shot-firer he is entitled to receive such instructions from the mine manager, where the evidence tends to show he was not an experienced shot-firer. (3) The fact that a coal miner may have a certificate from the Mine Examining Board does not relieve the mine manager from his duty to give instructions concerning the handling of explosives and the placing and blasting of shots in the mine, where the evidence tends to show said miner was inexperienced in reference thereto. (4) Where issue is taken on the declaration after demurrer raising the question of joinder has been overruled, the question of joinder cannot be raised in an appellate court. (5) Where the servant is a vice-principal it is proper practice to join the servant with the master in an action for personal injuries occasioned by the negligence of

such vice-principal. (6) Statute giving a right of action for violation of provisions of the mining statute applies as well to mine managers as to mine operators. (7) One good count supported by the evidence will sustain a verdict and judgment, although other counts in the declaration may not be good, or may not be supported by the evidence. Affirmed. (Boggs, J.)

**Practice—Bill of Exceptions—Necessary Elements.**

47d. *Denison Gholson Dry Goods Co. v. Martin*, Gen. No. 36. *Held*: A bill of exceptions must be signed by the trial judge and the certificate must show that it contains all the evidence in the case, otherwise the presumption is that the evidence was sufficient to warrant the court in the conclusion reached. Affirmed. (McBRIDE, J.)

**Forcible Entry and Detainer—Issue Involved—When Action Will Not Lie.**

48d. *Bisencon v. Walters*, Gen. No. 42, *Held*: (1) In actions of forcible entry and detainer the possession or right to possession is the only matter in controversy, and the evidence should be confined to this issue. (2) Where the entry of the defendant is peaceful and his occupation unmolested, an action for forcible entry and detainer will not lie. Affirmed. (Boggs, J.)

**Reversed on the Facts.**

49d. *Knights of Pythias v. Davis*, Gen. No. 37. Reversed on a review of record unless appellee files a remittur. Upon filing remittur judgment affirmed. (McBRIDE, J.)

**Sales—Right of Prospective Buyer to Refuse to Proceed—False Representations.**

50d. *Pritchett v. Griffin*, Gen. No. 53. *Held*: (1) Where a prospective vendee ascertains that he has been imposed upon by fraudulent representations before a final consummation of the sale, he has a right to refuse to proceed further. (2) Where false representations are made to induce a sale, it is immaterial whether the maker of such representations knew them to be false or not. If the vendee relies on the truth of the declaration, he is equally imposed on and injured and ought to have redress from the one who has been the cause of his injury. Affirmed. (McBRIDE, J.)

**Affirmed on the Facts.**

51d. *Knebelkamp v. Wiskamp Bros.*, Gen. No. 44. Affirmed on a review of the record. (HIGBEE, P. J.)

**Statute of Frauds—Original Undertaking—Lien Statute Construed.**

52d. *Granite City Lime & Cement Co. v. Board of Education*, Gen. No. 46. *Held*: (1) Where a defendant promises a plaintiff to pay for goods which may thereafter be delivered to a third person, and which at the time of the promise have not been delivered, no debt exists from such third person to the plaintiff, and, hence, the promise of the defendant to pay is an original undertaking, and is not merely a promise to pay the debt of another. (2) The object and purpose of the lien law is to protect those who in good faith furnish materials for the construction of buildings and such persons ought not by a strict construction to be deprived of this remedy. (3) The statute does not require that before a person furnishes material he shall have an agreement with the contractor and to so hold would be contrary to the spirit of the statute. Affirmed. (McBRIDE, J.)

**Practice—Form of Instructions—Dram Shop Act—Exemplary Damages—Relation Necessary to Support a Recovery—Proximate Cause—Ordinarily a Question for Jury.**

53d. *Halladay v. Murphysboro Supply Co.*, Gen. No. 47. *Held*: (1) The giving of an instruction in the language of the statute is not improper. (2) Where the evidence would warrant the jury in finding that the plaintiff had sustained some actual damages and if the liquor was sold to the deceased

in violation of the statute with reference to the sale of intoxicating liquors to minors, then the defendant cannot complain if an instruction broad enough to include exemplary damages is given. (3) Where the acts done are in violation of the orders of the principal no exemplary damages may be recovered. (4) If it appears that support was contributed to the plaintiff, even if the relation of parent and child does not exist, and that by reason of the unlawful sale of liquor and consequent intoxication, the plaintiff has been injured in his means of support, he is entitled to recover whatever loss the jury may determine that he has sustained. (5) Where there is evidence tending to show any particular thing could be the proximate cause, the jury are the judges under such circumstances of what constitutes such proximate cause. Affirmed. (McBRIDE, J.)

**Contracts—Effect of Reducing Contract to Writing—Measure of Damages for Breach.**

54d. *Ford Motor Co. v. Fry*, Gen. No. 51. *Held*: (1) All prior agreements are merged in a written contract. (2) In an action by the vendor against the vendee of goods and chattles, for a refusal to accept and pay for them, if the vendor retains the goods and chattels, the measure of damages is the difference between the contract price and the market value. In the case of a re-sale of goods and chattels, the measure of damages is the difference between the contract price to the first purchaser and the price received on the re-sale. (3) Where the re-sale is at the same price as that agreed upon, the vendor is entitled to recover only his expense, if any, in affecting the re-sale. Affirmed. (BOGGS, J.)

**Right of Upper Proprietor to Drainage—Effect of Organization of a District Under a Levee and Drainage Act Upon Owners of Land Not Within the District—Right to Recover for Future Damages Arising from Permanent Structure.**

55d. *Hoehn v. East Side Levee & Sanitary District*, Gen. No. 52. *Held*: (1) The right of drainage is governed by the law of nature, and the lower proprietor cannot do anything which will prevent the natural flow of surface waters and cast it back upon the land above, and no distinction is made between surface waters and those which flow in some natural water-course. (2) An aggregation of land owners cannot by voluntarily accepting the privileges conferred by a Levee and Drainage Act, organize a district and erect a levee which obstructs the natural flow of water and injures the land of another without becoming liable therefor. (3) Where the continuance and operation of a permanent structure are not necessarily injurious but may or may not be so, then only the injury sustained prior to the commencement of the suit may be compensated in that suit. Affirmed. (BOGGS, J.)

**Practice—Effect of Misdescription of Defendant in Motion to Set Aside Judgment of Default—Nature of Motion to Set Aside Default.**

56d. *Nichols v. Rogers-Nichols Live Stock Commission Co.*, Gen. No. 57. *Held*: The mere fact of an incorrect description given to the defendant in the body of a motion to set aside judgment ought not to deprive the defendant of a hearing thereunder when motion is properly signed. (2) A motion to set aside a default is addressed to the sound, legal discretion of the trial court, and unless it appears that such discretion has been wrongfully and oppressively exercised, a court of review will not interfere. Affirmed. (McBRIDE, J.)

**Jurisdiction of Justices of Peace—Extension of Action of Trespass by Section Thirty-six of Practice Act.**

57d. *Mangis v. Jones*, Gen. No. 55. *Held*: (1) The jurisdiction of a justice of the peace is to be determined by the question whether he has power under the statute to render valid judgment in the case, and while a

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freehold may be incidentally involved, yet if he has jurisdiction to give a judgment in response to the action, the fact that a freehold is so involved does not deprive him of jurisdiction. (2) In a suit for damages to real estate, judgment is for such damage and does not pretend to affect the title. (3) By section 36 of the Practice Act the remedy by action in trespass to real estate has been enlarged or extended. The reversioner or remainderman though not in possession may now have his action in trespass against any other person, whether in possession or not, for an injury to his right or interest in the land, whereas before the statute was enacted, he could not maintain such action unless in possession. Affirmed. (HIGBEE, P. J.)

### **Res Ipsa Loquitur—Contributory Negligence—Effect of Doctrine of Res Ipsa Loquitur—Practice—Instructions—Harmless Error.**

58d. *Jensen v. East St. Louis Railway Co.*, Gen. No. 60. *Held:* (1) Where an injury occurs to a person who is a passenger, in the exercise of ordinary care, upon the car of a common carrier, by some defect in the machinery wholly under the control of the carrier, a prima facie case of negligence on the part of the carrier is established, and the burden of proof is upon it to show that the accident was without its fault. (2) In times of sudden danger or threatened peril the injured person is not charged with using the safest way to avoid the danger, but to act under such judgment only as an ordinarily prudent person might exercise under the circumstances and conditions as they existed at the time. (3) The fact that after being put in sudden danger by a defendant's negligence, a plaintiff is injured by his own act in attempting to escape from injury, does not necessarily charge him with contributory negligence, but leaves it a question for the jury to decide whether he acted as a reasonably prudent person might have done under the same circumstances. (4) The effect of the doctrine of res ipsa loquitur is merely to raise a presumption that the injury was caused by the fault of the defendant, but this inference may be rebutted. (5) While the court may refuse to give an instruction submitted in abstract form, yet the giving of such an instruction is not reversible error. Affirmed. (HIGBEE, P. J.)

### **Agency—Vice-Principal Defined—Proximate Cause.**

59d. *Daley v. New Staunton Coal Co.*, Gen. No. 61. *Held:* (1) A vice-principal is one to whom is deputed the discharge of some duty or the exercising of some power which belongs to the master as such, and he does not act as vice-principal when engaged in any work which does not pertain to the duty or peculiar power of the master. (2) If the negligent act and the injury are known by common experience to be usual in consequence and the injury is most likely to follow the act of negligence in the ordinary course of events, it is always a question of fact for the jury whether the negligence was the proximate cause of the injury. Affirmed. (McBRIDE, J.)

### **Practice—Effect of Reception of Incompetent Evidence Where Trial Is Had by Court Without Jury.**

60d. *Miller v. Mayberry et al.*, Gen. No. 63. *Held:* (1) Where trial is had by court without a jury, it is to be presumed that the court only considered the competent evidence admitted on the hearing, if the competent evidence in the record is sufficient to sustain the findings and the judgment of the court, it is sufficient, notwithstanding the reception of incompetent evidence, as the same harmful effect does not follow in such a case, as when the trial is before a jury. Affirmed. (BOGGS, J.)

### **Measure of Damages to Realty—Practice—How Instructions Are to Be Considered—Instructions Concerning Preponderance of Evidence.**

61d. *Powell v. Alton & Southern R. R.*, Gen. No. 64. *Held:* (1) In action for damage to property occasioned by the construction and operation of a railroad the true measure of damages is the difference in the fair cash market value of the property before and after the construction and

operation of the road complained against. (2) The instructions given by the court are to be read and considered together and if when so considered, they state the law applicable to the case, with substantial correctness, it is sufficient. (3) An instruction concerning the preponderance of the evidence should include the number of witnesses as one of the elements to be considered by the jury in determining where lies the preponderance of the evidence, but an instruction which fails to do so will not cause a reversal of the case except where the element of the number of witnesses is shown to be important. Affirmed. (Boggs, J.)

**Practice—Conflicting Instructions—Effect of Omission of Word “Preponderance” in Instructions to Jury on Evidence.**

62d. *Pirtle v. Gray*, Gen. No. 68. *Held*: (1) Where the instructions given in a case state contrary propositions of law and are conflicting so that the jury cannot tell which rule they should follow, they necessarily tend to mislead and a judgment based thereon should be reversed unless the court can clearly see that no prejudice has resulted. (2) The objection that an instruction uses the expression “as the jury may believe from the evidence,” omitting the word “preponderance” before the word evidence is not tenable. This form of expression has been employed so long by courts and lawyers as to become a fixed practice. “If you believe from the evidence” means no more nor no less than “if you believe from a preponderance of the evidence.” The fact that the belief of the jury is based on the evidence is the essential thing. Affirmed. (HIGBEE, P. J.)

**Effect of Change of Territory from Saloon to Anti-Saloon Territory Upon Leases of Property “For Saloon Purposes”—Constructive Eviction—What Constitutes Waiver of.**

63d. *Hill v. Terre Haute Brewing Co.*, Gen. No. 69. *Held*: (1) Where property is leased “for saloon purposes” and the territory within which the property is located becomes anti-saloon territory, in an action for rent a plea which sets forth this fact but does not set forth a surrender of possession or offer to surrender the same will not bar the action. (2) No constructive eviction exists without a surrender of possession. Possession after a alleged constructive eviction is a waiver of right of abandonment. With retention of possession after constructive eviction, liability for rent exists, according to the terms of the lease, during occupancy thereunder. Affirmed. (McBRIDE, J.)

**Practice—Right to Prosecute an Appeal.**

64d. *Bucher Packing Co. v. McAllister*, Gen. No. 71. *Held*: The right to prosecute an appeal from a judgment or decree is purely statutory and can only be taken when allowed by an order of the court and in conformity with the order of the court. Affirmed. (HIGBEE, P. J.)

**Agency—How Proved.**

65d. *Hummel & Needs v. Freshwater*, Gen. No. 72. *Held*: (1) Declarations of an alleged agent are not sufficient to prove agency. (2) In order to hold a defendant as principal it is necessary to prove facts and circumstances surrounding the transaction for which defendant is sought to be held as principal which go to prove that the defendant held out the person with whom the plaintiff dealt as his agent in connection with the matters and things involved or that an actual agency existed. Affirmed. (Boggs, J.)



# ILLINOIS APPELLATE COURT CASES MONTHLY DIGEST

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## IN THE FOURTH DISTRICT

Opinions Digested by Student Editor Paul E. Price.

OPINIONS FILED DECEMBER 12, 1916.

### **Negligence—Presumption Arising from Discharge of Firearms.**

66d. *Newkirk, Admr. v. Gross*, Gen. No. 73. *Held*: (1) If a person is injured by the discharge of a firearm in the hands of one who has entire control of it, the burden is upon the latter to prove that the gun was not fired by him, either intentionally or negligently, but that the result was inevitable and without the least fault on his part. (2) Firearms are not usually discharged without the intervention of some human agency. A presumption, therefore, almost conclusive in its character, is raised, that, when such weapons are discharged while in the possession and control of another, the firing was either by design, carelessness, or inadvertency upon his part. *Affirmed.* (BOGGS, J.)

### **Statutes, Construction of.**

67d. *Barnard v. Queen City Quarry Co.*, Gen. No. 74. *Held*: Statutes in derogation of the common law are to be strictly construed. *Affirmed.* (McBRIDE, J.)

### **Affirmed on the Facts.**

68d. *Sternberger v. Anheuser-Bush Brewing Assn.*, Gen. No. 75. *Affirmed* on a review of the record. (BOGGS, J.)

### **Practice—Bill of Exceptions—Necessity for Stating that Bill of Exceptions Contains All the Evidence—What Will Not Suffice.**

69d. *Steffey v. Sandifer*, Gen. No. 78. *Held*: (1) Where a bill of exceptions does not state that it contains all the evidence and the trial judge fails to so certify, but where there is bound with the record a certificate of the Official Reporter "the foregoing is a true and complete copy of all the evidence," this does not meet the requirements of the law. A reporter's certificate has no place in the bill of exceptions. It must be stated in the bill of exceptions that it contains all the evidence, or it must be so stated in the judge's certificate, and if it is not so stated it will be assumed that the verdict of the jury was correct on the facts. *Affirmed.* (HIGBEE, P. J.)

### **Conservators—Authority to Bring Suits in Chancery.**

70d. *Burton v. Estate of Hugh McGreever*, Gen. No. 79. *Held*: Under the statute a conservator has a right to bring suits in chancery in good faith to protect the rights of his ward, and the statute itself is sufficient to give the authority to bring the suit, and it is not necessary for the conservator first to obtain an order of record in the probate court before bringing same. *Affirmed.* (HIGBEE, P. J.)

### **Affirmed on the Facts.**

71d. *Hawk v. Farmers' Serum Co.*, Gen. No. 81. *Affirmed* on a review of the record. (HIGBEE, P. J.)

### **Public Officers—Presumption That They Have Done Their Duty—Effect of Failure of Officer Taking Acknowledgment to Make Memorandum Required by Statute—Right of Husband to Make Conveyance to Wife When in Failing Circumstances.**

72d. *Riggin v. Kech*, Gen. No. 83. *Held*: (1) In the absence of proof to the contrary it is presumed that a public officer who has taken an acknowledgment has done his duty and made the memorandum required by law in his docket or book kept for that purpose. (2) Even though the officer who has taken the acknowledgement of the chattel mortgage or bill of sale fails to make the memorandum required by statute in his docket or book

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kept for that purpose, the rights of the mortgagee or purchaser who had no control over the officer, could not be prejudiced by such failure. (3) A husband may make a conveyance to his wife, when in failing circumstances, if he does so upon a full and fair consideration and where such conveyances are made in good faith they will be sustained to the extent of the consideration actually paid. Affirmed. (Boggs, J.)

**Pleading—Effect of Amended Declaration—Landlord and Tenant—Repairs—Caveat Emptor—Right to Recover for Inquiries to Persons Identified With Tenant.**

73d. *Park v. Penn*, Gen. No. 21. *Held*: (1) Where a declaration has been amended after verdict, it is upon the declaration as amended after verdict that a plaintiff must rely to sustain his judgment. (2) The rule of caveat emptor applies to a contract of letting, and a landlord is not bound to make repairs unless he has assumed such agreement with the tenant. The tenant takes the premises as he finds them, subject to his own risk, and there is no implied covenant on the part of the landlord that they are fit for habitation, or fit for the purposes for which they are rented, or that they are in any particular condition. The landlord is not therefore liable for damages resulting to the tenant by reason of the demised premises being out of repair, unless he has expressly bound himself to make repairs by the terms of the contract to let. (3) Persons identified with a tenant, as a sub-tenant, guest, servant or wife of the tenant, have only the same right to recover against the landlord as the tenant's right had the accident occurred to him. Reversed. (HIGBEE, P. J.)

## IN THE FIRST DISTRICT

Opinions digested by Student Editors Turnbull, Breyer, Carson,  
Marshall, Price, Segal, Coon, Golding and Sherwood.

OPINIONS FILED JANUARY 22, 1917.

**Equity Jurisdiction—Appointment of Receiver—Hostile Expressions.**

596a. *Herhold v. Herhold Chair Co.*, Gen. No. 22451. *Held*: A receiver will not be appointed because of past dereliction or past dangers, but because of present conditions and a well-founded apprehension that such appointment is an imperative necessity to preserve the property of the company. Such apprehension must rest upon facts clearly proven by evidence and cannot rest upon mere hostile expressions. Affirmed. (McSURELY, P. J.)

**Reversed on the Facts.**

597a. *Williams v. Veeder*, Gen. No. 22571. Reversed on a review of the record and judgment here. (McSURELY, P. J.)

**Common Carriers—Status of Railroads Furnishing Facilities to Express Companies.**

598a. *Ford v. American Express Co.*, Gen. No. 22581. *Held*: Railroads, in the furnishing of facilities to express companies for the transportation of their traffic, are not common carriers but act only as private agents under such agreements as they may make with the express companies; the duty owed to the public is by the express companies as common carriers, not by the railroads. Affirmed. (McSURELY, P. J.)

**Sales—Warranty of Fitness for a Particular Purpose—Set-Off.**

599a. *Waldes v. Hanes*, Gen. No. 22593. *Held*: (1) Sales of instruments and machinery by manufacturers are accompanied by a warranty of fitness for the purpose for which they are intended. (2) A warranty, either express or implied, is an undertaking collateral to the contract of sale and may be set off in an action by the seller for the purchase price. Affirmed. (McSURELY, P. J.)

**Practice—Abstract of the Record.**

600a. *Elia v. Societa M. S. D. P. Crati*, Gen. No. 22599. *Held*: The abstract is the pleading of the parties and must inform the court of review as to the character of the case and the issue involved; where it fails to do so, the judgment will be affirmed. *Affirmed.* (McSURELY, P. J.)

**Practice—Waiver of Error in Overruling Motion for Change of Venue by Participation in the Trial—Judicial Notice of a Municipal Ordinance.**

601a. *Chicago v. Simonetti*, Gen. No. 22600. *Held*: (1) Participation in a trial is a waiver of any alleged error of the trial judge in previously overruling an application for a change of venue. (2) Where the ordinance which a defendant is charged with violating is not preserved for review, the court of review cannot take judicial notice of it, but must presume the correctness of the finding of the trial court. *Affirmed.* (McSURELY, P. J.)

**Practice—Effect of a Stenographic Report Not Filed According to Section 23 of the Municipal Court Act.**

602a. *Chicago v. Boller*, Gen. Nos. 22601-2. *Held*: Where appellant fails to file a stenographic report, correctly signed, within 30 days after entry of judgment or fails within that time to apply for an extension of time for such filing, as provided by section 23 of the Municipal Court Act, the trial court has no jurisdiction to allow further time and a stenographic report not filed in accordance must be stricken out, and a court of review, as a result, cannot consider assignments of error based upon the sufficiency of evidence. *Affirmed.* (McSURELY, P. J.)

**Practice—Prejudicial Remarks by the Trial Court.**

603a. *Hallissey v. Rothschild & Co.*, Gen. No. 22606. *Held*: Where the verdict is the only one the jury could properly have reached on the evidence, the judgment should not be reversed even if remarks by the court might be construed to be prejudicial. *Affirmed.* (McSURELY, P. J.)

**Practice—Amendment of an Information—Necessity of Fixing Value Under a Statute Providing Punishment According to the Value of the Property Stolen.**

604a. *People v. Thompson*, Gen. No. 22610. *Held*: (1) In the matter of amendment, an information stands on entirely different grounds from an indictment. The officer by whom an information is presented being always in court, it may on his application, be amended to any extent which the judge admits to be consistent with the ordinary conduct of judicial business, with the public interest and with private rights. (2) Wherever the measure or kind of punishment depends on the value of the property stolen, the jury, or court when the trial is by the court, must find that value as part of the verdict or finding, and without such finding the conviction cannot be supported. *Reversed and remanded.* (HOLDOM, J.)

**Landlord and Tenant—Constructive Eviction.**

605a. *Lawler v. McNamara*, Gen. No. 22612. *Held*: Failure of a landlord to furnish heat in an apartment in accordance with the terms of a lease amounts to constructive eviction which justifies the tenant in abandoning the premises. *Affirmed.* (McSURELY, P. J.)

**Affirmed on the Facts.**

606a. *Meisel v. Kahns*, Gen. No. 22617. *Affirmed* on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

607a. *People v. Meyers*, Gen. No. 22625. *Affirmed* on a review of the record. (HOLDOM, J.)

**Contracts—Liquidated Damages.**

608a. *Giesecke v. Cullerton*, Gen. No. 22627. *Held*: (1) The words of a bond designating an obligation as a penal sum have no absolutely determin-

ative effect in deciding whether the provision is for a penalty or liquidated damages. (2) Where the damages are uncertain and the court by construction of the contract believes that the parties, bona fide, estimated and agreed upon the damages likely to be sustained from a breach of agreement, the provision will be enforced as liquidated damages. Affirmed. (McSURELY, P. J.)

**Equity Practice—Dismissal for Want of Prosecution While Cause is on Reference Before a Master.**

609a. *Meyer v. I. Lurya Lumber Co.*, Gen. No. 22629. *Held*: Ordinarily a chancery suit will not be dismissed while the cause is on reference before a master, but it may be if the parties, being duly notified are not present in court when the cause is called for trial or if the failure to prosecute consists in a failure to proceed under the order of reference to the master or to take steps for the final disposition of the cause. Affirmed. (HOLDOM, J.)

**Practice—Abstract of Record.**

610a. *People v. Shapiro*, Gen. No. 22631. *Held*: The abstract is the pleading of the parties and must be construed against them. Where it does not appear on the abstract that judgment has been entered the writ of error must be dismissed. Writ of error dismissed. (McSURELY, P. J.)

**Affirmed on the Facts.**

611a. *Pico v. Chicago Railways Co.*, Gen. No. 22640. Affirmed on a review of the record. (McSURELY, P. J.)

**Domestic Relations—Husband and Wife—Post-Nuptial Contract of Settlement—Waiver of Alimony.**

612a. *Mundstock v. Mundstock*, Gen. No. 22647. *Held*: Where a husband and wife make a post-nuptial contract settling their respective rights to property owned by them, while living together as husband and wife and without contemplation of divorce proceedings, it does not remove husband's liability to support or relieve him from the payment of alimony following a divorce granted for his misconduct. Affirmed. (HOLDOM, J.)

**Practice—Section 32 of the Practice Act—Filing of the Declaration.**

613a. *Beamesderfer v. Cermak*, Bailiff, Gen. No. 22648. *Held*: Under Section 32 of the Practice Act a declaration must be filed ten days before the term of court to which the summons is returnable and if it is not filed ten days before the second term of the court, the defendant is entitled to a judgment as in the case of non-suit. Reversed and remanded with directions. (McSURELY, P. J.)

OPINIONS FILED FEBRUARY 5, 1917.

**Affirmed on the Facts.**

614a. *Gillette v. Bryant*, Gen. No. 22228. Affirmed on a review of the record. (HOLDOM, J.)

**Evidence—Hurd's R. S. Chap. 51, Sec. 5—Competency of Husband to Testify in an Action to Which Wife is a Party—Agency—Presence of Principal During Negotiations.**

615a. *St. George v. Printy*, Gen. No. 22530. *Held*: (1) Chap. 51, Sec. 5 of Hurd's R. S., makes a husband incompetent to testify to any transaction or conversation had during the marriage in an action where the wife is a party except those cases where the suit involves the separate property right of the wife and those cases where the husband has acted as agent for his wife. (2) The fact that the wife is present and takes some part in the conversation which finally results in a contract does not prevent the husband from acting at that time and under those circumstances as her agent. Reversed and remanded. (DEVIER, J.)

**Affirmed on the Facts.**

616a. *Dickey v. Wells*, Gen. No. 22537. Affirmed on a review of the record. (DEVIER, J.)

**Domestic Relations—Husband and Wife.**

617a. *State v. Bryson*, Gen. No. 22540. *Held*: Where there is no intentional abandonment of a child by its mother, she has the right to its custody as against any third party if such is for the best interest and welfare of the child. *Reversed*. (HOLDOM, J.)

**Fraud—Liability for Credit Granted on Fraudulent Representation.**

618a. *Crane Co. v. Ummach*, Gen. No. 22544. *Held*: An officer of a corporation is liable in deceit for goods furnished to it on a basis for securing a continuing credit, even though such representations are not made exactly at the time of sale. *Reversed and remanded*. (DEVER, J.)

**Affirmed on the Facts.**

619a. *Trembacs v. Dvorakova*, Gen. No. 22553. *Affirmed* on a review of the record. (DEVER, J.)

**Practice—Denial of Execution of an Instrument By a Corporation.**

620a. *Douglas State Bank v. Chicago Bonding and Surety Co.*, Gen. No. 22576. *Held*: Under Sec. 53 of the Practice Act, providing that denial of execution of any instrument in writing must be verified by the affidavit of the alleged signer, a corporation is not restricted to deny execution by the affidavit of the particular agent who signed the instrument, but may use the affidavit of any agent. *Affirmed*. (DEVER, J.)

**Pleading—Allegation in Declaration of Service on Municipal Corporation of Notice in Personal Injury Suit.**

621a. *Edmunds v. City of Chicago*, Gen. No. 22578. *Held*: (1) The notice required by Sec. 7, Chap. 70, Hurd's R. S., must be properly alleged in the declaration. (2) Averring the giving of notice by referring to the notice attached to the declaration as "Exhibit A" is not a proper allegation that such notice was given. *Affirmed*. (HOLDOM, J.)

**Contracts—Brokers' Commissions—Conditions Precedent.**

622a. *Stein v. Ememon*, Gen. No. 22583. *Held*: (1) Although usually real estate brokers are entitled to their commissions when they procure a purchaser willing, ready and able to buy upon the agreed terms, the parties may stipulate some other condition precedent. (2) Where a promise to pay money is conditioned upon the happening of a future event, the condition precedent must be exactly performed before the contract can be enforced. *Reversed and judgment nil capiat*. (DEVER, J.)

**Contracts—Account Stated—Pleading an Ultra Vires Contract.**

623a. *Thompson Bros. Feed Co. v. Neiman Bros. Co.*, Gen. No. 22596. *Held*: (1) In ordinary business transactions an account transmitted from one individual to another, if not objected to within a reasonable time, will be deemed an account stated. (2) If the objection of *ultra vires* is not tendered before final judgment in the court below, it cannot be taken advantage of on appeal. *Affirmed*. (DEVER, J.)

**Affirmed on the Facts.**

624a. *Slater v. Ball*, Gen. No. 22597. *Affirmed* on a review of the record. (HOLDOM, J.)

**City Ordinance—Right to Receive Money Paid for Vacation of Alley.**

625a. *Lockwood and Stuckland Co. v. City of Chicago*, Gen. No. 22614. *Held*: Money paid to a municipal corporation voluntarily for the vacation of an alley in accordance with the provisions of a city ordinance, cannot be recovered back. *Affirmed*. (HOLDOM, J.)

**Affirmed on the Facts.**

626a. *Freeman v. Counsell*, Gen. No. 22605. *Affirmed* on a review of the record. (HOLDOM, J.)

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### Affirmed on the Facts.

627a. *Cronstedt v. McCormick*, Gen. No. 22608. Affirmed on a review of the record. (DEVER, J.)

OPINIONS FILED FEBRUARY 7, 1917.

### Evidence—Effect of Admission of Incompetent Evidence in Trial Without Jury.

628a. *O'Brien v. Salerno*, Gen. No. 21066. *Held*: Where a case is tried by a court without a jury the finding will not be disturbed because of the improper admission of evidence if there is before the court sufficient competent evidence to sustain the finding. Affirmed. (GOODWIN, J.)

### Innkeepers—Right to Open Boxes Pledged, Before Sale.

629a. *Farrell v. Stafford*, Gen. No. 21204. *Held*: Where an inn-keeper receives an unopened box under special pledge with power of sale, he is not governed by the Inn-Keepers' Act, but may, and is required to, open said box and exhibit the contents thereof before sale. Affirmed. (GOODWIN, J.)

### Debtor and Creditor—Assignment.

630a. *Samuel v. Coles*, Gen. No. 21303. *Held*: Where the interest of an assignee is not absolute, but qualified, payment to the assignor will protect the debtor except as to the actual interest of the assignee. Hence, where an assignment of a debt owing from a third party is given to secure an indebtedness from the assignor to the assignee, a judgment in such a case would be limited to the amount of that indebtedness. Affirmed. (GOODWIN, J.)

### Contracts—Set Off—Unliquidated Damages.

631a. *Perfection Pulverising Mills v. Keiser*, Gen. No. 21504. *Held*: Where a plaintiff sues on a contract and the defendant claims damages for a breach of the same contract, such damages may be allowed even though unliquidated. Affirmed. (TAYLOR, J.)

### Evidence—Ambiguity.

632a. *Wenduagel v. Schiavone*, Gen. No. 21526. *Held*: Parol testimony is admissible for the purpose of explaining or removing any uncertainty or ambiguity in a written contract, and where the meaning of words is not clear, parol evidence may be introduced to ascertain what the real meaning is. Affirmed. (TAYLOR, J.)

### Trusts—Liability for Loss of Money Received for Use of Another.

633a. *National Surety Co. v. Goldenberg Furniture Co.*, Gen. No. 21535. *Held*: Where a collector agrees to account for and turn over to the company each day all money collected during the preceding day, he does not become the debtor of the company on the collection of any of the funds—but merely the custodian or trustee and if they are stolen in the meantime without his fault, he is relieved of liability. Affirmed. (GOODWIN, J.)

### Contracts—Presumption of Promise of Father to Answer for Obligations of Infant Son.

634a. *William and Vashiti College v. Shatford*, Gen. No. 21571. *Held*: Where it appears in evidence that a father has expressly authorized his minor son to incur certain obligations, at a certain time, and it appears that the son incurred similar obligations at a later time, to the knowledge of the father, although without his express direction, and that the father subsequently ratified the later acts, it is sufficiently proven that the father undertook the obligation of the later act. Affirmed. (TAYLOR, J.)

### Affirmed on the Facts.

635a. *Gulliksen v. White Eagle Brewing Co.*, Gen. No. 21584. Affirmed on a review of the record. (TAYLOR, J.)

**Damages—Statutory Damages on Appeal.**

636a. *Pfeiffer v. The Hudson Manufacturing Co.*, Gen. No. 21603. *Held*: Where an appeal is so clearly without merit as to warrant the conclusion that is merely for the purpose of delay, this court will also award statutory damages. *Affirmed.* (GOODWIN, J.)

**Practice—Jurisdiction in Suits Against Administrators.**

637a. *Slad v. Hajicek*, Gen. No. 21608. *Held*: Where a Probate Court has taken jurisdiction of the estate of one deceased and still retains such jurisdiction, its jurisdiction is exclusive and a suit at law cannot be maintained. *Affirmed.* (TAYLOR, J.)

**Affirmed on the Facts.**

638a. *General Cement Gun Co. v. Temple Engine and Pump Co.*, Gen. No. 21616. *Affirmed* on a review of the record. (O'CONNOR, P. J.)

**Reversed on the Facts.**

639a. *Muller v. Neumeister*, Gen. No. 21631. *Reversed* and remanded on a review of the record. (TAYLOR, J.)

**Contracts—Waiver of Breach—Set-off.**

640a. *Waldschmidt v. The Marsh & Bingham Co.*, Gen. No. 21660. *Held*: Where a vendor fails to perform on time in a contract where time is of the essence, buyer may waive the breach and he cannot later in an action by the seller for buyer's rejection of the goods set off his damages from vendor's failure to perform at the stipulated time. (GOODWIN, J.)

**Evidence—Res Ipsa Loquitur.**

641a. *Simmons v. Commonwealth Edison Co.*, Gen. No. 21686. *Held*: When an accident occurs, which in the ordinary course of things would not happen if those who had the management used proper care, the duty of explanation is thrown upon those having such management, especially where information concerning the thing itself is within their peculiar knowledge. Thus proof that a charged wire broke and fell upon the sidewalk under no unusual circumstances throws the burden of explanation upon the defendant. *Affirmed.* (GOODWIN, J.)

**Affirmed on the Facts.**

642a. *Nichol v. Clark*, Gen. No. 21722. *Affirmed* on a review of the record. (O'CONNOR, P. J.)

**Common Carriers—Stipulation in a Contract Limiting Liability.**

643a. *Hudson v. G. R. & I. Ry. Co.*, Gen. No. 21732. A stipulation in a contract limiting carrier's liability for negligent delay to the cost of feeding and watering the stock is invalid, and a shipper is not estopped from showing further loss although he obtained a lower rate by agreeing to such stipulation. *Reversed* and remanded. (GOODWIN, J.)

**Garnishment.**

644a. *Marino v. Parisi*, Gen. No. 21748. *Held*: Payment to creditor by debtor after debtor has received a notice of garnishment does not discharge debtor's liability to garnishor. Judgment reversed and judgment in this court. (O'CONNOR, P. J.)

**Suretyship—Extension of Time to Principal.**

645a. *American Hard Rubber Co. v. Howe*, Gen. No. 21776. *Held*: Where an extension of time is given the principal for the payment of money by a valid and binding agreement without the guarantor's consent, the latter is discharged. *Affirmed.* (O'CONNOR, P. J.)

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**Evidence—Depositions.**

646a. *Hodges Fiber Carpet Co. v. The Hugo Manufacturing Co.*, Gen. No. 21109. *Held*: The failure of a certificate of a notary to show an



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adjournment in the taking of a deposition will not be sufficient to suppress it in the absence of a showing that one of the parties was thereby injured or surprised. Affirmed. (BARNES, P. J.)

### Reversed on the Facts.

647a. *Marino v. Parisi & Morra*, Gen. No. 21747. Reversed and judgment in this court on a review of the record. (McDONALD, J.)

### Affirmed on the Facts.

648a. *Kittier v. Chicago and Western Indiana Railroad Company*, Gen. No. 21803. Affirmed on a review of the record. (McGOORTY, J.)

### Reversed on the Facts.

649a. *Globe Indemnity Co. v. Hesner*, Gen. No. 21870. Reversed and judgment here on a review of the record. (BARNES, P. J.)

### Torts—Personal Injuries—Instructions to Jury.

650a. *Leirtan v. Chicago City Ry. Co.*, Gen. No. 21888. *Held*: The extent of recovery upon the ground of loss in the business of the injured party is the value of services of the party, and in the absence of more specific evidence as to the value of such services, it is misleading and prejudicial to instruct the jury that it is not necessary "that any witness should express an opinion as to the amount of such damages." Reversed and remanded. (McGOORTY, J.)

### Contracts—Silence as to Interest and Place of Payment.

651a. *Chicago & Riverdale Lumber Co. v. Tatum*, Gen. No. 21894. *Held*: Where a contract makes no provision for interest, and is silent with respect to the place of payment in the latter event it must be presumed that the money is payable when the contract is executed; and the existence or non-existence of the right to recover interest must also be determined from the *lex loci contractus*. Reversed and remanded. (McDONALD, J.)

### Torts—Actions for Death.

652a. *Purinton v. Belt Ry. Co. of Chicago*, Gen. No. 21905. *Held*: In actions for death, no recovery can be had without proof of the exercise of ordinary care by the deceased. Reversed and remanded. (BARNES, P. J.)

### Contracts—Personal Injuries Resulting from Breach of Warranty by Vendor.

653a. *Cedar Rapids & Iowa City Ry. & Light Co. v. Sprague Electric Co.* Gen. No. 21918. *Held*: While the purchaser of a warranted article may rely upon his warranty and recover damages for a breach thereof, yet where such warranted article proves defective and the danger of its continued usage becomes obvious to the purchaser and he knowingly continues to use it without remedying the defect, he does so at his peril, and he cannot, in an action against the vendor for breach of warranty, recover for such damages as resulted from such negligent conduct on his part. Reversed. (McDONALD, J.)

### Torts—Actions for Death.

654a. *Devine v. Chicago City Ry. Co.*, Gen. No. 21938. *Held*: In actions for death, no recovery can be had without proof of the exercise of ordinary care by the deceased. Reversed with finding of fact. (BARNES, P. J.)

### Affirmed on the Facts.

655a. *Wood Street Planing Mill Company v. Industrial Board of Illinois*, Gen. No. 21941. Affirmed on a review of the record. (McDONALD, J.)

### Practice—Dismissal of Petition.

656a. *People v. La Salle Street Trust & Savings Bank*, Gen. No. 21954. *Held*: Where a petitioner fails to prove the material allegations of his petition, and no application for continuance is made for the purpose of producing such proof, it cannot be said that the court erred in dismissing the petition. Affirmed. (McDONALD, J.)

**Municipal Corporations—Invalid Contracts.**

657a. *Holmes v. City of Chicago*, Gen. No. 21957. *Held*: Where a municipal corporation undertakes to construct and operate water works, it does so in the exercise of its private and not its governmental functions and it therefore follows that having accepted the benefits of the contract, it is estopped to deny its validity. Affirmed. (McGOORTHY, J.)

**Joint Judgment—Void if Void as to One.**

658a. *White Oak Coal Co. v. Burns*, Gen. No. 21968. *Held*: Where defendants are sued jointly, a judgment which is void as to one is void as to all. Reversed and remanded. (McDONALD, J.)

**Contracts—Lack of Mutuality.**

659a. *Chicago Railways Co. v. Morris & Co.*, Gen. No. 21980. *Held*: A contract to sell all material is not void for want of mutuality or uncertainty because one of the parties reserves the right to keep and refuse to sell whatever portion of the material it may consider necessary for they became bound to sell no other. Reversed and remanded. (McGOORTHY, J.)

**Affirmed on the Facts.**

660a. *Emerson v. Chicago City Ry. Co.*, Gen. No. 21983. Affirmed with remittitur on a review of the record. (BARNES, P. J.)

**Insurance—By-Laws Passed Subsequent to Contract Construed Most Favorable to Assured.**

661a. *Scott v. United Order of Foresters*, Gen. No. 22005. *Held*: (1) If a contract of insurance is susceptible of two interpretations, the courts will adopt the one which is most favorable to assured. (2) It is only when a member in express terms agrees to be bound by constitutional amendments or by-laws as may thereafter be enacted that he is bound by future amendments or by laws which impair the obligations of his contract injuriously. Affirmed. (McGOORTHY, J.)

**Affirmed on the Facts.**

662a. *Hannibal Trust Co. of Hannibal, Mo., a corporation v. Lang*, Gen. No. 22020. Affirmed on a review of the record. (McDONALD, J.)

**Municipal Corporations—Landlord and Tenant—Tenancy from Year to Year.**

663a. *Lehman v. City of Chicago*, Gen. No. 22041. *Held*: Where a municipal corporation holds over it is bound to a tenancy from year to year the same as a private individual would have been bound. Affirmed. (BARNES, P. J.)

**Reversed on the Facts.**

664a. *Pfister v. Western Union Telegraph Co.*, Gen. No. 22057. Reversed on a review of the record. (McDONALD, J.)

**Reversed on the Facts.**

665a. *The E. R. Stege Company v. Kostner*, Gen. No. 23020. Reversed on a review of the record. (BARNES, P. J.)

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**Reversed on the Facts.**

666a. *Lincoln Electric Heating Appliances Co. v. Schultz*, Gen. No. 21683. Reversed on a review of the record. (O'CONNOR, P. J.)

**Equity Practice—Maxim of "Clean Hands."**

667a. *Barnes v. Barnes*, Gen. No. 21926. *Held*: Where a cause of action had its origin in iniquity, a court of chancery will not lend its aid to a complaining party, because "He who comes unto equity must come with clean hands." But where the iniquity does not go to the right of action itself but affects only the proof of certain items incidentally connected therewith, the rule cannot be extended to preclude the complaining party from obtaining the relief sought as to other items which the evidence clearly shows to be untainted with such iniquity. Reversed and remanded with directions. (McDONALD, J.)

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## IN THE FIRST DISTRICT

Opinions Digested by Student Editors Turnbull, Breyer, Carson,  
Marshall, Price, Segal, Coon, Golding, and Sherwood.

OPINIONS FILED FEBRUARY 19, 1917.

**Affirmed on the Facts.**

668a. *City of Chicago v. Bisso*, Gen. No. 22064. Affirmed on a review of the record. (McSURELY, P. J.)

**Affirmed on the Facts.**

669a. *City of Chicago v. Bisso*, Gen. No. 22065. Affirmed on a review of the record. (McSURELY, P. J.)

**Reversed on the Facts.**

670a. *Wagner v. Gallaher*, Gen. No. 22587. Reversed and remanded on a review of the record. (HOLDOM, J.)

**Affirmed on the Facts.**

671a. *City of Chicago v. Simonetti*, Gen. No. 22066. Affirmed on a review of the record. (McSURELY, P. J.)

**Power of Attorney—Transfer of Shares—Estoppel.**

672a. *Swigart v. Stoops, McKey, Trustee in Bankruptcy*, Gen. No. 22513. *Held*: Where the owner of shares of stock signs a letter of attorney to transfer in blank, he confers an authority upon any subsequent bona fide holder for value, to fill in his own name and is estopped from denying the existence of such authority. Reversed. (DEVER, J.)

**Affirmed on the Facts.**

673a. *Chicago and Riverdale Lumber Co. v. Quinliven*, Gen. No. 22550. Affirmed on a review of the record. (McSURELY, P. J.)

**Reversed on the Facts.**

674a. *Baldwin v. Kadison*, Gen. No. 22604. Reversed and judgment here on a review of the record. (DEVER, J.)

**Affirmed on the Facts.**

675a. *Central Fire Extinguisher Co. v. Seymour*, Gen. No. 22613. Affirmed on a review of the record. (DEVER, J.)

**Divorce—Alimony.**

676a. *Heizer v. Heizer*, Gen. No. 22620. *Held*: In a proceeding for a divorce, a valid judgment or decree for alimony must provide for the payment of a fixed, definite sum. Reversed. (DEVER, J.)

**Contracts—Necessity of Definite Terms.**

677a. *Wolf v. Selig Polyscope Co.*, Gen. No. 22644. *Held*: A contract to be enforceable must be definite as to amount, price, terms of payment and time of delivery. Reversed. (McSURELY, P. J.)

**Set-off—Unliquidated Damages Arising Out of Covenants Disconnected from the Subject Matter of Plaintiff's Claim.**

678a. *Porter Fishback & Co. v. Peck*, Gen. No. 22655. *Held*: Unliquidated damages arising out of contracts or covenants disconnected from the subject matter of plaintiff's claim are not proper subjects of set-off under the statute. [Municipal Court Act.] Affirmed. (HOLDOM, J.)

**Pleading—Demurrers.**

679a. *Barrett v. Marchak*, Gen. No. 22657. *Held*: Where a demurrer to a plea is sustained and the pleader does not ask leave to amend his plea, he will be held to abide by or "stand by" his plea, and may be heard to urge in a court of review that his plea was good in law and that it was error to hold it insufficient on demurrer. Reversed. (McSURELY, P. J.)

**Practice—Appeals from Interlocutory Orders.**

680a. *Evans v. Potts*, Gen. No. 22664. *Held*: The right to appeal is strictly statutory and the order appealed from being an interlocutory order, however desirable it might be to determine at the threshold of the case the right of the Superintendent of Insurance to become a party defendant, the statute will not permit the court to review such an interlocutory order. Appeal Dismissed. (HOLDOM, J.)

**Mortgages—Assertion of Dower or Homestead Right Against a Purchase Money Mortgage—Wife's Homestead Right in Husband's Property During His Lifetime—Conveyance to Wife.**

681a. *Chicago Savings Bank and Trust Co. v. Dunn*, Gen. No. 22665. *Held*: (1) Dower right cannot be asserted against a purchase money mortgage; the wife of the owner of the equity of redemption is neither a necessary nor a proper party to proceedings to foreclose a mortgage of that kind. (2) A wife has no homestead right in her husband's property during his lifetime while he continuously resides with his family. Her rights are merely contingent, somewhat like the inchoate right of dower. (3) A wife's homestead right cannot be asserted against a purchase money mortgage. (4) A conveyance of a homestead not exceeding in value \$1,000 by a householder to his wife, she not joining therein and acknowledging the same as required by the statute, is absolutely void and passes no title whatever. Reversed and remanded. (McSURELY, P. J.)

**Unfair Competition—Adequate Remedy at Law for Trade Slander—Contracts Partly Oral and Partly in Writing.**

682a. *Midland Press v. Compton & Co.*, Gen. No. 22674. *Held*: (1) The remedy at law for trade slander is adequate; therefore where equitable relief in such circumstances is sought to be invoked, it will be denied. (2) A contract partly in writing and partly oral is an oral contract. Affirmed. (HOLDOM, J.)

**Workmen's Compensation Act—Finality of Industrial Board's Decision on Questions of Fact—Application of Indiana Act to Interstate Commerce Employees—Transcript of Foreign Judgment.**

683a. *Drira v. Charles Tea Co.*, Gen. No. 22675. *Held*: (1) Section 19 of the Indiana Workmen's Compensation Act, providing that the act "shall not apply to employes engaged in interstate or foreign commerce, nor to their employers, in case the laws of the United States provide for compensation or for liability for injury or death by accident of such employes," includes under the Act by implication all other employees engaged in interstate commerce not so provided for by federal statute. (2) A transcript of the judgment itself, duly authenticated, of the Workmen's Compensation Law of Indiana, and of the procedure in the particular case from which the judgment sued upon resulted is a sufficient transcript of the judgment of a foreign state to support an action thereon in this state. (3) The Workmen's Compensation Act makes the decision of the Industrial Board, if it acts within its powers, in the absence of fraud conclusive upon the courts. The Circuit court and the Supreme court, in reviewing a proceeding of this kind, can review only questions of law. Whether legal evidence is offered to support the decision of the board, where such evidence is properly preserved for review here, is a question of law, but if there is competent or legal evidence to support the decision of the board, it is not within the province of the courts to pass upon its weight or sufficiency. Affirmed. (McSURELY, P. J.)

**Appeal Bond—Recitals in—Estoppel to Deny.**

684a. *Paulin v. American Surety Co.*, Gen. No. 22680. *Held*: The obligor and sureties are alike estopped, when sued upon an appeal bond, to set up defenses which contradict the recitals of the bond, and where the bond recites the existence of a judgment the obligor and sureties are estopped to deny its existence or validity. Affirmed. (HOLDOM, J.)

**Libel—Criticism of a Public Official—Pleading a Justification.**

685a. *Cooper v. Lawrence*, Gen. No. 21522. *Held*: (1) Fair and reasonable comment and criticism upon the acts of judicial affairs, which are matters of public concern, are allowable and are sometimes called "privileged;" but this privilege extends only to acknowledged or proved facts; not to untrue statements of particular acts of misconduct. (2) A plea of justification must be as broad as the declaration. Reversed. (TAYLOR, J.)

## II ILLINOIS LAW REVIEW

OPINIONS FILED MARCH 8, 1917.

### **Affirmed on the Facts.**

686a. *Silbar v. Engwald*, Gen. No. 21727. Affirmed on a review of the record. (GOODWIN, J.)

### **Practice—Motion to Vacate.**

687a. *Prouty v. Armstrong*, Gen. No. 21742. *Held*: Where a defendant in a motion to vacate alleges damages which grow out of the transaction giving rise to the plaintiff's claim and the claim of the defendant if true would defeat the claim of the plaintiff, a motion to vacate and for leave to plead will be granted. Reversed. (GOODWIN, J.)

### **Practice—Requirement of the Payment of Attorney's Fees as a Condition to the Vacation of a Judgment.**

688a. *Brook v. Smerling*, Gen. No. 21752. *Held*: Where a defendant has had actual and timely notice of the fact that a petitioner would apply on a certain date for a hearing, the court may require the payment of attorney's fees as a condition to the vacation of an order or judgment rendered at such hearing upon defendant's failure to appear. Affirmed. (GOODWIN, J.)

### **Damages—Vindictive—Removal of Goods—Violation of Lease.**

689a. *Proctor v. Rhorbeck*, Gen. No. 21758. *Held*: A plaintiff can recover vindictive damages even when there are no circumstances indicating insult or indignity. Affirmed. (TAYLOR, J.)

### **Reversed on the Facts.**

690a. *Hiller v. Holman*, Gen. No. 21761. Reversed and remanded with directions on a review of the record. (O'CONNOR, P. J.)

### **Reversed on the Facts.**

691a. *Barry v. City of Chicago*, Gen. No. 21769. Reversed on a review of the record. (GOODWIN, J.)

### **Reversed on the Facts.**

692a. *Woods v. City of Chicago*, Gen. No. 21770. Reversed on a review of the record. (GOODWIN, J.)

### **Reversed on the Facts.**

693a. *Levy v. Payne*, Gen. No. 21788. Reversed and remanded upon a review of the record. (O'CONNOR, P. J.)

### **Reversed on the Facts.**

694a. *Harnett v. City of Chicago*, Gen. No. 21790. Reversed on a review of the record. (GOODWIN, J.)

### **Practice—Separate Appearance not Necessary in Tax Cases—Rule of County Court Void as Contrary to Sec. 33, Chap. 53 R. S.**

695a. *People v. Campbell*, Gen. No. 21794. *Held*: The rule in the County Court, Rule 1 under "Rules on Application for Judgment in Tax Matters, Appearance Fee—General," which follows: "A separate appearance fee shall be paid by every property owner objecting to the sale of his property or application for judgment by the county collector for delinquent general taxes," is void as being contrary to Sec. 33, Chap. 53 R. S. Reversed and remanded with directions. (O'CONNOR, P. J.)

### **Contracts—Justification for Refusal to Marry is a Question of Law.**

696a. *Bradley v. Schroyer*, Gen. No. 21810. *Held*: An institution which leaves the jury to determine what is "a good and legal cause" for the breach of a contract to marry is erroneous, since it is a question of law to be decided by the trial judge. Reversed. (O'CONNOR, P. J.)

### **Procedure—Justice of Peace Docket—Absence of Record of Filing of Appeal Bond—Setting Aside a Void Judgment After Expiration of Term.**

697a. *Rybarscyk v. Weglars*, Gen. No. 21852. *Held*: (1) In the absence, upon the docket of the justice of the peace, of any record that an

## APPELLATE COURT DIGEST

appeal bond has been filed, no appeal is taken and Circuit Court can acquire no jurisdiction of the parties or the subject matter. (2) The court has power to set aside a void judgment after the term at which it was entered has expired. Reversed. (O'CONNOR, P. J.)

### **Affirmed on the Facts.**

698a. *Curran v. Good*, Gen. No. 21865. Affirmed on a review of the record. (O'CONNOR, P. J.)

### **Affirmed on the Facts.**

699a. *Kuebler v. Kuebler*, Gen. No. 21883. Affirmed on a review of the record. (GOODWIN, J.)

### **Insurance—Filing of Proofs of Loss—Computing Time.**

700a. *Dierssen v. Williamsburg City Fire Ins. Co.*, Gen. No. 21931.

701a. *Dierssen v. National Ben Franklin Fire Ins. Co.*, Gen. No. 21932.

**Held:** Where a condition in an insurance policy requires proofs of loss to be made within sixty days from the time of the fire, the proper method of computing the time is to exclude the day named as the day on which the fire occurred and include the day on which the act is to be done, unless it falls on Sunday, and then it also shall be excluded. Affirmed. (O'CONNOR, P. J.)

### **Affirmed on the Facts.**

702a. *Dierssen v. The Albany Insurance Co.*, Gen. No. 21933. Affirmed on a review of the record. (O'CONNOR, P. J.)

### **Affirmed on the Facts.**

703a. *Thompson v. Hale*, Gen. No. 22059. Affirmed on a review of the record. (O'CONNOR, J.)

### **Affirmed on the Facts.**

704a. *People v. Lillingston*, Gen. No. 22458. Affirmed on a review of the record. (TAYLOR, J.)

### **Pleading—Aider by Verdict—Chap. 48, Hurd's R. S.—Health and Safety of Employees' Act—Dangerous Appliances—Failure of Factory Inspector to Notify Employer.**

705a. *Varvey v. Ajax Forge Co.*, Gen. No. 22636. **Held:** (1) Objection to the pleadings cannot be taken for the first time on appeal. Where parties without objection go to trial without formally joining issue, the irregularity is waived after verdict. (2) The fact that a serious injury to plaintiff was inflicted by a mechanical device, that soon after the accident, on diligent search and inquiry, defendant discovered and applied to the device an efficient method of protection so that the device became harmless stamps the appliance as dangerous under Chapt. 48, Hurd's R. S., "Health and Safety of Employees' Act." (3) Chapt. 48, Hurd's R. S., "Health and Safety of Employees' Act" imposes absolutely upon the employer the duty to protect dangerous machinery and a failure to do so cannot be excused by the failure of the factory inspector to give notice to the owner. Affirmed. (HOLDOM, J.)

### **Affirmed on the Facts.**

706a. *Kuebler v. Kuebler*, Gen. No. 22695. Affirmed on a review of the record. (GOODWIN, J.)

### **Affirmed on the Facts.**

707a. *Kuebler v. Kuebler*, Gen. No. 22986. Affirmed on a review of the record. (GOODWIN, J.)

### **Equity—Receivership of Assets for an Unsecured Creditor.**

708a. *Pearson v. Tucson Farms Co.*, Gen. No. 23019. **Held:** An equitable attachment is not recognized and there must be some exceptional equity in order to permit a receivership for the benefit of an unsecured creditor who has obtained neither judgment nor decree. (TAYLOR, J.)

## II ILLINOIS LAW REVIEW

OPINIONS FILED MARCH 12, 1917.

### **Affirmed on the Facts.**

709a. *University Club of Chicago v. Deakin*, Gen. No. 21815. Affirmed on a review of the record. (HOLDOM, J.)

### **Reversed on the Facts.**

710a. *Dixon v. Smith-Wallace Shoe Co.*, Gen. No. 22551. Reversed on a review of the record with judgment of *nil capitat* and for costs. (HOLDOM, J.)

### **Affirmed on the Facts.**

711a. *Holmes v. Straus*, Gen. No. 22598. Affirmed on a review of the record. (DEVER, J.)

### **Practice—Remedy of Assignee of Claim of Heir of a Deceased Person.**

712a. *People v. Rigdon*, Gen. No. 22673. *Held*: The remedy of an assignee of the claim of an heir of a deceased person is by application to the Probate Court before the final settlement of the estate. Affirmed. (DEVER, J.)

### **Reversed on the Facts.**

713a. *Old Colony Trust & Savings Bank v. Hirtzel*, Gen. No. 22681. Reversed and remanded on a review of the record. (DEVER, J.)

### **Reversed on the Facts.**

714a. *Boissat v. Lippincott*, Gen. No. 22682. Reversed upon a review of the record. (MCSURELY, P. J.)

### **Contracts—Accord and Satisfaction.**

715a. *Illinois Smelting & Refining Co. v. Cyclone Fence Co.*, Gen. No. 22683. *Held*: Where there is a *bona fide* dispute between a debtor and creditor as to a portion of a claim made by the creditor, and the debtor sends to the creditor payment of the sum he admits to be due, with the express or implied condition that it is to be accepted as payment in full or returned, there is an accord and satisfaction if the creditor retains it, and the creditor cannot thereafter recover the balance he claims to be due. Affirmed. (DEVER, J.)

### **Affirmed on the Facts.**

716a. *Sharff v. Herman*, Gen. No. 22684. Affirmed on a review of the record. (HOLDOM, J.)

### **Contracts—Goods Requiring Peculiar Tastes of the Trade—Vendee's Judgment Conclusive.**

717a. *Vicken v. Vaughan Co.*, Gen. No. 22685. *Held*: Where a contract provides that one is to act as agent in the sale of another's products upon commission, and the agent secures an order "subject to approval" by the vendee, where the article is of such a kind that the peculiar tastes and requirements of the trade are to be considered, the judgment of the vendee must be conclusive, and if he notifies the seller that the goods are unsatisfactory, there is no obligation to proceed further, and the agent is not entitled to commission. Reversed and judgment here. (MCSURELY, P. J.)

### **Pleading—May Not Insist It Was Error to Overrule Demurrer to Plea Where One Elects to Reply—Recoupment Where There are Several Defendants.**

718a. *Elia v. Bavuso & Guglielmo*, Gen. No. 22686. *Held*: (1) Where there is a demurrer to a plea and it is overruled and the plaintiff does not stand by the demurrer, but elects to reply to the plea, it cannot be insisted that overruling the demurrer was error. (2) There may be, in an action of debt, a judgment in favor of one defendant on a recoupment or set-off where there are more than one defendant. Affirmed. (DEVER, J.)



# **Illinois State Bar Association**

**ORGANIZED JANUARY 4, 1877**

## **OFFICERS**

### *President*

**NATHAN WILLIAM MACCHESNEY, Chicago**

### *Vice-Presidents*

**ALBERT D. EARLY, Rockford   ROGER SHERMAN, Chicago  
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### *Official Organ*

**Quarterly Bulletin—R. Allan Stephens, Publisher and Editor,  
Danville, Illinois**

### **HEADQUARTERS:**

**204 Hotel Leland, Springfield, Illinois**

### **CHICAGO HEADQUARTERS:**

**212 Hotel La Salle, Chicago**

## **Fortieth Annual Meeting of the Illinois State Bar Association**

The Illinois State Bar Association will hold its fortieth Annual Meeting at the Hotel La Salle, Chicago, on Thursday, Friday and Saturday, June 1, 2 and 3, 1916.

The Illinois Society of the American Institute of Criminal Law and Criminology and the Illinois State's Attorneys Association will meet at same time and place.

Nathan William MacChesney of Chicago will deliver the President's Address on the subject:—"Democracy and Efficiency through Law."

The Honorable Charles J. Doherty, K. C. M. P., Minister of Justice of Canada will deliver the annual address on some questions of International Law.

Honorable William J. Calhoun, former Minister to China will speak at the meeting on "The History and Application of the Monroe Doctrine."

Samuel Rosenbaum, Esq., of the Philadelphia Bar has accepted an invitation to speak on the "Rule Making Powers in the English Courts."

Professor Charles Cheney Hyde of Northwestern University will speak on "Our Treaties after the War."

Senators Lawrence Y. Sherman and James Hamilton Lewis have both been invited and are expected to be present and speak on the general subject of International Law.

The Board of Governors have chosen for the subject of general discussion at the meeting "Changes and Amendments to the Substantive Law of Illinois." The various County Bar Associations of the State will be invited to send delegates to the meeting and they will be allotted ten minutes each in which to present the changes and amendments to the law which their respective associations believe are most needed to effect desired reforms.

Various committees of the Association that have been at work during the past year will present their reports.

The activities of the Association during the past year, which has been an eventful one, will be reviewed by John F. Voigt, the Secretary.

On Thursday June 1st, the Judicial Section of the State Bar Association will begin its sessions. This section is intended to embrace all the judges of all the courts of this state and is expected to bear the same relation to the State Association that the Judicial Section of the American Bar Association now bears to that Association. The Judicial Section is a new activity of the State Bar Association. It is confidently believed that the meeting of and consultation among the judges of the State must be most helpful in the administration of justice in this state.

The Illinois Society of the American Institute of Criminal Law and Criminology will hold its annual meeting in conjunction with the State Bar Association. This Society will begin its sessions on Thursday June 1st at the Hotel LaSalle. Its meeting will include a dinner Thursday night and its sessions will close with a joint meeting with the State Association Friday night. Judge Albert C. Barnes of the Illinois Appellate Court will deliver the President's Address on "How Can Results be more speedily attained in Criminal Cases." Miss Amelia Sears, Superintendent Juvenile Protective Association, will read a paper on "Vocational Education in Relation to Juvenile Delinquency", and her paper will be discussed by William N. Gemmill, William J. Bogan and Frank M. Leavitt, all of Chicago, and William C. Graves of Pontiac. William G. Hale of Urbana will give a brief review of the Criminal Cases in the Supreme Court for the past year, and Robert W. Millar of Chicago will discuss this report. Maclay Hoyne, State's Attorney of Chicago, and Thomas M. Kilbride of Springfield will speak on "Probation and Parole in Their Relation to Crime" which will be followed by a general discussion.

The program for the joint session includes the following: "Practical Phases of Medico-Psychological Work for Courts" by Dr. William J. Hickson and Dr. William Healy, to be followed by a general discussion in which Harry Olson, Dr. Herman C. Stevens, Robert H. Gault and Nathan William MacChesney will participate.

The Illinois State's Attorneys Association will hold its "Summer Meeting" in Chicago in connection with the State Bar Association and the Society of Criminal Law. President Floyd E. Thompson of Rock Island announces that an interesting program is being prepared, the details of which will be published later.

All of these organizations meeting at the same time and place will bring to Chicago on the first three days of June prominent lawyers and judges from practically every county in the state. These meetings will close by joining the State Bar Association in its Annual Banquet at the Hotel La Salle, Saturday night, June 3rd. The programs outlined and the preparations under way promise to make this meeting one of the most notable in the history of the Illinois State Bar Association.

\* \* \* \* \*

The Illinois State Bar Association is holding this year under the leadership of its President, Nathan William MacChesney of the Chicago Bar, a series of dinners at the Hotel La Salle, Chicago, as follows:

- Nov. 6, 1915. Dinner in honor of the Supreme Court of Illinois.
- Dec. 29, 1915. Dinner in honor of the Association of American Law Schools.
- Feb. 19, 1916. Dinner tendered to Hon. John Barrett, Director-General Pan-American Union, who spoke on "Pan-Americanism and the Monroe Doctrine."
- March 18, 1916. Dinner tendered to Hon. Theodore Burton of Ohio, who spoke on "Distinctive Political Tendencies of the Times."
- April 29, 1916. Dinner tendered to Colonel Theodore Roosevelt, who spoke on "National Duty and International Ideals." This meeting was the largest gathering of the Bar in the history of the State and the largest banquet ever served in Chicago. There were 1,500 members and guests present.
- June 3, 1916. Annual Banquet, Hotel La Salle, Chicago. President MacChesney, Hon. Charles J. Doherty, Senator James Hamilton Lewis and others will speak.

# ILLINOIS STATE BAR ASSOCIATION

ORGANIZED JANUARY 4, 1877

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## PROGRAM OF THE FORTIETH ANNUAL MEETING

Thursday, June 1, 1916.

### Morning Session, 10 A. M.

Report of the Secretary-Treasurer, John F. Voigt.

#### Reports of Committees:

Admissions—Clarence Griggs, Chairman.

New Members—Bruce A. Campbell, Chairman.

Grievances—Delbert A. Clithero, Chairman.

Organizations and to Co-operate with Local Bar Associations—  
R. Allen Stephens, Chairman.

Program Committee—Frederick A. Brown, Chairman.

On Audit and Expenses—Hugo Sonnenschein, Chairman.

On Revision of Constitution and By-Laws of the Association—  
Frederick A. Brown, Chairman.

On Permanent Headquarters at Springfield—George H. Wilson,  
Chairman.

On Special Train to the 1915 American Bar Association Meeting—  
Charles J. O'Connor, Chairman.

### 11 A. M.

President's Address—"Uniform State Laws—A Means to Efficiency Consistent with Democracy." Nathan William MacChesney.

### Afternoon Session, 2 P. M.

Address—"Legislative Tendencies." Walter George Smith, Philadelphia.

Address—"The History of the Monroe Doctrine." William J. Calhoun.

General discussion of changes and amendments desired to the Substantive Law of Illinois (10 minutes each):

Thomas Worthington, Jacksonville.

John Faissler, Sycamore.

William L. Patton, Springfield.

Oliver B. Dobbins, Champaign.

H. M. Stone, Bloomington.

Nels A. Larson, Rock Island.

J. D. Welsh, Galesburg.

H. S. Hicks, Rockford.

Isaac A. Love, Danville.

John R. Fitzgerald, Decatur.

### Evening Session, 8 P. M. Programme furnished by the Illinois Society of the American Institute of Criminal Law and Criminology—Joint Meeting.

Address—"Practical Phases of Medico-Psychological Work for Courts."  
Dr. William J. Hickson and Dr. William Healy.

#### Discussion by—

Harry Olson, Dr. Herman C. Stevens, Professor Robert H. Gault  
and Nathan William MacChesney.

Friday, June 2, 1916.

**Morning Session, 10 A. M.** General discussion continued on changes and amendments desired to the Substantive Law of Illinois (10 minutes each):

Jacob W. Rausch, Morris.  
 Franklin L. Velde, Pekin.  
 James Reilly, Springfield.  
 C. B. Chapman, Ottawa.  
 J. L. O'Donnell, Joliet.  
 John E. Wall, Quincy.  
 Charles W. Hadley, State's Attorney, Wheaton.  
 James W. Kern, State's Attorney, Watseka.  
 Wayne H. Dyer, State's Attorney, Kankakee.  
 John H. Lewman, State's Attorney, Danville.

**11 A. M.**

Annual Address—"Respective Rights of Neutrals and Belligerents Upon the High Seas." Charels J. Doherty, K. C. M. P., Minister of Justice, Ottawa, Canada.

**Afternoon Session, 2 P. M.**

Address—"The Law of Blockade and the United States." Charles Cheney Hyde.

Address—"Rule Making Powers in the English Courts." Samuel Rosenbaum, of Philadelphia.

Reports of Committees:

Legal History and Biography—George A. Lawrence, Chairman.

Select Committee to Present Invitation of the Illinois Bar to the American Bar Association to Hold Its 1916 Annual Meeting in Chicago and of Committee on Local Arrangements for A. B. A. 1916 Convention—Edgar A. Bancroft, Chairman.

On Uniform State Laws—Frederick R. De Young, Chairman.

On Non-Partisan Judiciary—Edward C. Kramer, Chairman.

Committee on Classification of Illinois Law—Floyd R. Mechem, Chairman.

On Legislaive Drafting—Ernst Freund, Chairman.

On New Constitution for Illinois—George F. Buckingham, Chairman.

On the Enforcement of Law and to Co-operate with the Illinois State's Attorneys' Association—Oscar H. Wylie, Chairman.

To Co-operate with Illinois Society of Criminal Law and Criminology and to Improve the Administration of the Criminal Law—Albert C. Barnes, Chairman.

To Devise Plan for Retirement Fund for Aged Lawyers and to Raise Funds Therefor—Joseph H. Defrees, Chairman.

On Professional Ethics—John M. Zane, Chairman.

To Arrange for Bar Primary When District in Which Judge Is to Be Elected Is Larger Than a Single County—Rudolph J. Kramer, Chairman.

Report of Necrologist—Thomas Dent.

Report of Delegates to American Bar Association—Thomas J. Norton, Chairman.

Report of Editor and Publisher of Quarterly Bulletin—R. Allan Stephens.

Report of Special Committee to Present Resolutions on Death of Justice Alonzo K. Vickers—Bruce A. Campbell, Chairman.

Report of Committee to Inaugurate Samuel Alschuler as U. S. Circuit Judge—Edgar Bronson Tolman, Chairman.  
 Report of Delegate to Attend Conference on Juvenile Court of Cook County—Harry E. Smoot.  
 Report of Tellers Announcing Result of Election. James A. Peterson, Chairman.

### ANNUAL RECEPTION AND DINNER.

Hotel La Salle.

Friday Evening, June 2, 1916, 6:30 P. M.

#### Speakers:

The President of the Association, Nathan William MacChesney, Toastmaster.  
 The Governor of Illinois, Edward F. Dunne.  
 The Minister of Justice of Canada, Charles J. Doherty.  
 The Senator from Illinois, James Hamilton Lewis.  
 The Secretary of the Interior, Franklin K. Lane.

### JUDICIAL SECTION PROGRAM

(For Judiciary Only.)

Wednesday, May 31, 1916.

- 9:00 A. M. to 12:30 P. M. Registry and reception for all judges holding court in this state, in Rooms 208 to 212 inclusive, La Salle Hotel, headquarters Illinois State Bar Association.
- 12:30 P. M. Tables reserved for members of this section in Louis XVI room, La Salle Hotel. Course luncheon at 75c for those who desire.
- 2:00 P. M. Section convenes, Chief Justice Farmer presiding. Welcome by the chairman of the Reception Committee, Hon. Wm. H. McSurely, Judge Appellate Court, Chicago.
- 2:10 P. M. A discussion on "Needed Legislation for County and Probate Courts."  
 Hon. Henry Horner, Judge Probate Court, Cook County....Chicago  
 Hon. James M. Endicott, County Judge, White County.....Carmi  
 Hon. Wm. L. Pond, County Judge, DeKalb County.....Sycamore  
 Hon. Wm. C. DeWolf, County Judge, Boone County.....Belvidere  
 Hon. Perry L. Persons, County Judge, Lake County.....Waukegan  
 Hon. J. J. Cooke, Judge City Court, Beardstown.....Beardstown
- 3:00 P. M. A discussion on "Is Our Present Probation Law Productive of Good or Evil?"  
 Hon. John W. Houston, Chief Probation Officer, Cook Co...Chicago  
 Hon. Roscoe J. Carnahan, County Judge, Stephenson Co...Freeport  
 Hon. Jacob H. Hopkins, Judge Municipal Court, Chicago...Chicago  
 Hon. DeWitt T. Hartwell, Judge Circuit Court, First Circuit..Marion  
 Hon. George Kersten, Judge Circuit Court, Cook County....Chicago
- 4:00 P. M. A discussion on "Should Courts Take Cognizance of Public Sentiment?"  
 Hon. Frank K. Dunn, Judge Supreme Court of Illinois....Charleston  
 Hon. James C. McBride, Judge Circuit Court, Second Circuit  
 .....Taylorville  
 Hon. Charles A. McDonald, Chief Justice Superior Court, Cook  
 County .....Chicago  
 Hon. James S. Baume, Judge Circuit Court, Fifteenth Circuit..Galena  
 Hon. H. C. Moran, Judge City Court of Canton.....Canton  
 Hon. Samuel C. Stough, Judge Circuit Court, Thirteenth Cir..Morris



ILLINOIS STATE BAR ASSOCIATION

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7:00 P. M. Dinner in Red Room. Price of dinner \$2.00. Hon. George A. Carpenter, Judge of the District Court for the Northern District of Illinois, presiding. Symposium on the question: "Are Our Courts Courts of Law or Courts of Justice?"

Hon. James H. Cartwright, Judge Supreme Court of Illinois..Oregon

Hon. Frederick A. Smith, Chief Justice Circuit Court, Cook  
County ..... Chicago

Hon. George A. Crowe, Judge Circuit Court, Third Cir...E. St. Louis

Hon. Albert C. Barnes, Judge Appellate Court, First District..Chicago

Hon. Samuel Alschuler .....Aurora

Judge U. S. Circuit Court of Appeals, Seventh Circuit.

ILLINOIS STATE SOCIETY OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY

FIFTH ANNUAL MEETING.

(All members of the Bar invited.)

FIRST SESSION.

3 P. M., Wednesday, May 31.

East Room, Hotel La Salle.

1. Annual Address by the President—"Causes of Delay in Criminal Cases." Judge Albert C. Barnes, Appellate Court, Chicago.

2. "Vocational Education in Relation to Juvenile Delinquency"—Miss Amelia Sears, Superintendent Juvenile Protective Association, Chicago.  
Discussion—

William N. Gemmill, Judge Municipal Court, Chicago.

William C. Graves, Superintendent, Illinois State Reformatory, Pontiac.

William J. Bogan, Principal Lane Technical High School, Chicago.  
Professor Frank M. Leavitt, School of Education, University of Chicago.

3. "A Brief Review of the Criminal Cases in the Supreme Court for the Past Year"—William G. Hale, Professor of Law, University of Illinois, Urbana.

Discussion—

Robert W. Miller, Professor of Law, Northwestern University Law School, Chicago.

DINNER.

6:30 P. M., Wednesday, May 31.

Hotel La Salle (For room see bulletin board).

Members of the Bar Association, the State's Attorneys' Association, their wives and friends, are invited to join the members of the Illinois State Society in this dinner.

## SECOND SESSION.

Joint session of the Illinois State Society and the Illinois State's Attorneys' Association.

8:00 P. M., Wednesday, May 31.

East Room, Hotel La Salle.

1. "Probation and Parole in Their Relation to Crime"—MacClay Hoyne, State's Attorney, Chicago, and Thos. M. Kilbride, Clerk State Board of Pardons, Springfield.

Discussion—

Bernard Flexner of the Chicago Bar.

John W. Houston, Chief Probation Officer Cook County, Chicago.

F. Emory Lyon, Superintendent Central Howard Association, Chicago.

Lowell B. Smith, State's Attorney, Sycamore.

David R. Joslyn, State's Attorney, Woodstock.

Jesse L. Deck, State's Attorney, Decatur.

Edmund Burke, State's Attorney, Springfield.

Oscar H. Wylie, State's Attorney, Paxton.

2. Business session.

## THIRD SESSION.

Joint session of the Illinois State Society and the Illinois State Bar Association.

8:00 P. M., Thursday, June 1.

Ball Room, Hotel La Salle.

1. "Practical Phases of Medico-Psychological Work for Courts"—

Dr. William J. Hickson, Director Psychopathic Laboratory, Municipal Court, Chicago.

Dr. William Healy, Director Psychopathic Institute, Juvenile Court, Chicago.

Discussion—

Harry Olson, Chief Justice, Municipal Court, Chicago.

Dr. Herman C. Stevens, Director Psychopathic Laboratory, University of Chicago.

Robert H. Gault, Editor Journal of Criminal Law and Criminology and Associate Professor of Psychology, Northwestern University, Evanston.

Nathan William MacChesney, President Illinois State Bar Association, Chicago.

Notes—Discussion of topics is open to all present.

The dinner Wednesday evening will be informal. Reservation of plates (at \$2.00 each) may be made by writing to the secretary of the Illinois State Society, Chester G. Vernier, 212 Hotel La Salle, Chicago.







